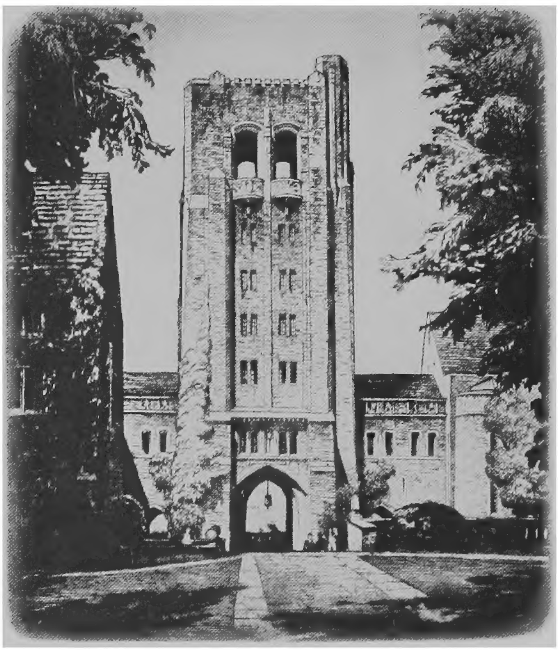

THE

LAW OF CONTRACTS.

BY

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THE LAW OF CONTRACTS.

CHAPTER V.

STATUTE OF FRAUDS.

The Statute of Frauds and Perjuries, passed in the twenty-ninth year of Charles the Second, was intended as an effectual prevention of all the more common frauds practised in society. But a great diversity of opinion, as to its effect, has existed both in England and in this country. Provisions substantially similar, however, have been made by the States of this country, although in no one State is the English statute exactly copied. The questions which have arisen under this statute are almost innumerable; and the great variety of cases leave some of them as yet unsettled. But the statute has had a most important operation upon a great variety of contracts; especially upon those of sale and guaranty; and we must endeavor to present the results of the widely extended adjudications on the subject.

The two sections which peculiarly affect the law of contracts, are the fourth and the seventeenth. By the fourth section it is enacted, that "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tene-

ments, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." By the seventeenth section it is enacted, that "no contract for the sale of any goods, wares, o merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is obvious, that the most general purpose of these sections is, to permit no party to bind himself except by a written promise, signed by him; because this will secure an exact statement and the best evidence of the terms and conditions of the promise. (*a*) Let us then first consider what signing is held to be sufficient; then what the agreement must contain and express; and then how it must be framed.

It was decided in the time of Lord *Hardwicke*, that a substantial signing of the agreement was sufficient, although it was not literal and formal. (*b*) Hence, if the agreement be not itself signed, but a letter alluding to and acknowledging the agreement is signed, this is sufficient. (*c*) It is not, however,

(*a*) Browne, St. Frauds, § 346.

(*b*) See Welford *v.* Beazely, 3 Atk. 503.

(*c*) Tawney *v.* Crowther, 3 Bro. Ch. 161, 318; Saunderson *v.* Jackson, 2 B. & P. 238; Shippey *v.* Derrison, 5 Esp. 190; Phillimore *v.* Barry, 1 Camp. 513; Allen *v.* Bennet, 3 Taunt. 169; De Beil *v.* Thomson, 3 Beav. 469; Macrory *v.* Scott, 5 Exch. 907; Gale *v.* Nixon, 6 Cowen, 445; Parker *v.* Parker, 1 Gray, 409; Toomer *v.* Dawson, Cheves, 68. And the letter may be sent to the plaintiff himself, or the acknowledgment may be contained in a letter sent to a third person. Welford *v.* Beazely, 3 Atk. 503. And the indorsement of an unsigned contract of sale by the vendee for the purpose of transfer will operate as a signature. Norman *v.* Molett, 8 Ala. 546. In Jackson *v.* Lowe, 1 Bing. 9, the purchaser of 100 sacks of good English seconds flour, at 45*s.* a sack, wrote to the vendors as follows: "I hereby give you notice, that the flour you delivered to me, in part performance of my contract with you for 100 sacks of good English seconds flour, at 45*s.* per sack, is of so bad a quality that I cannot sell it, or make it into salable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney. "Messrs. L.

enough that the agreement be written by the party himself unless he also signs it. (*d*) If, however, he writes his name in

and L. consider they have performed their contract with you so far as it has gone, and are ready to complete the remainder; and, unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount." *Held*, that the jury were warranted in concluding that the contract mentioned in the vendors' answer was the same as that particularized in the purchaser's letter, and that, therefore, the two writings constituted a sufficient memorandum of the contract under the 17th section of the statute of frauds. And see Fyson *v.* Kitton, Q. B. 1855, 30 Eng. L. & Eq. 374. So in Dobell *v.* Hutchinson, 3 A. & E. 355, the purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of the sale, and referring to them. Afterwards he wrote to the vendor, complaining of a defect in the title, referring to the contract expressly, and renouncing it. The vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract. *Held*, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendor under the statute of frauds, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by, the vendor. In Boydell *v.* Drummond, 2 Camp. 157, 11 East, 142, the paper containing the signature was held not to refer with sufficient certainty to the paper containing the terms of the contract.— Where there is a prior insufficient or unsigned written contract, the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though the order for goods be recognized, the terms of the contract are renounced and disaffirmed. Thus, in Cooper *v.* Smith, 15 East, 103, there was a defective memorandum of a bargain for the sale of goods; but the defendant wrote a letter, in which, though he admitted the order, he insisted that the goods had not been delivered in time; and it was *held*, that the letter did not supply the defects of the memorandum, and that it was not competent for the plaintiff to prove, by parol testimony, that it was not stipulated that the goods should be delivered within a given time. And this case was recognized in Richards *v.* Porter, 6 B. & C. 437. There A sent to B, on the 25th of January, an invoice of five pockets of hops, and delivered the hops to a carrier to be conveyed to B. In the invoice, A was described as the seller, and B as the purchaser of the hops. B afterwards wrote to A as follows: "The hops I bought of A on the 23d January are not yet arrived. I received the invoice; the last were longer on the road than they ought to have been; however, if they do not arrive in a few days, I must get some elsewhere." *Held*, that the invoice and this letter, taken together, did not constitute a note in writing of the contract to satisfy the statute of frauds. To the same effect is Archer *v.* Baynes, 5 Exch. 625. There the defendant verbally agreed to purchase of the plaintiff certain barrels of flour. The defendant afterwards wrote to the plaintiff, stating that he had received some barrels, which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows: "Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the bulk; and it was not until after you had examined it, and satisfied yourself both of the quality and condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these cir-

(*d*) Hawkins *v.* Holmes, 1 P. Wms. 770; Selby *v.* Selby, 3 Meriv. 2; Hubert *v.* Moreau, 12 J. B. Moore, 216; Anderson *v.* Harold, 10 Ohio, 399; Hubert *v.* Turner, 4 Scott, N. R. 486; Bailey *v.* Ogden, 3 Johns. 399. And *a fortiori*, a mere alteration of the instrument in the handwriting of the party sought to be charged, will not be sufficient. It has been *held*, that indorsements of payments are independent writings, and must be proved to be signed by the party sought to be charged, or by his consent. Turrell *v.* Morgan, 7 Minn 368; Hawkins *v.* Holmes, 1 P. Wms 770.

any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature; (*e*)

cumstances, you cannot, therefore, object to fulfil your agreement." The defendant replied as follows: "I beg to say, the barrels I have received is not the same I saw. I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the same. If you will take them back and pay charges, I will with pleasure send them. There must be some mistake about them." *Held*, that the letters did not constitute a sufficient note or memorandam, in writing, of the contract, within the 17th section of the statute of frauds. *Alderson*, B., said: "No doubt if the letter of the plaintiff of the third of October, and of the defendant in answer, taken together, contained a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. We have no difficulty, therefore, in coming to the conclusion, that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract, to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract: and the case is in truth governed by Richards *v.* Porter, which was cited in the course of the argument, and in which Lord *Tenderden* gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff. It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other; but whether he bought it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing." See also, Kent *v.* Huskinson, 3 B. & P. 233; Smith *v.* Surman, 9 B. & C. 561; Blair *v.* Snodgrass, 1 Sneed, 1. The letter, it seems, must be sent, and the memorandum completed before the action is brought. Bill *v.* Bament, 9 M. & W. 36. In that case, *Martin, arguendo*, contended, that a memorandum written after the commencement of the action was sufficient. But *Parke*, B., said: "With regard to the point which has been made by Mr. *Martin*, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but I am clearly of opinion that it is untenable. There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned." But see Fricker *v.* Thomlinson, 1 Man. & G. 772

(*e*) Thus, in Propert *v.* Parker, 1 Russ. & M. 625, it was *held*, that if the defendant himself write the agreement for the purchase of a leasehold house, and states his own name in the third person, as "Mr. A. B has agreed;" this is a good contract within the statute of frauds, though he does not otherwise sign the agreement; the Master of the Rolls observing that "what the statute of frauds requires is, that the party who is sought to be charged shall, by writing his own name, have attested that he has entered into the contract." So in Johnson *v.* Dodgson, 2 M. & W. 653, where the defendant wrote in his own book a memorandum of the contract, and requested the other's signature, this was held to be a sufficient acknowledgment of the contract, and his name was considered as signed, though not appearing at the end, but in the body of the memorandum. And Lord *Abinger* said: "The statute of frauds requires that there should be a note or memorandum of the contract in writing, signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there

but not otherwise. (*f*) But an entry by the seller in his order book, on the fly-leaf of which, at the beginning, his name was

being a note in writing showing the terms of the contract, and recognized by him. I think in this case the requisitions of the statute are fully complied with." Again, in Merritt *v.* Clason, 12 Johns. 102; s. c. *nom.* Clason *v.* Bailey, 14 id. 484, it was *held*, that a memorandum of a contract for the purchase of goods, written by a broker employed to make the purchase, in his book, in the presence of the vendor, the names of the vendor and vendee and the terms of the purchase being in the body of the memorandum, but not subscribed by the parties, is a sufficient memorandum within the statute of frauds. See also, Ogilvie *v.* Foljambe, 3 Meriv. 53; Penniman *v.* Hartshorn, 13 Mass. 87; Knight *v.* Crockford, 1 Esp. 190; Saunderson *v.* Jackson, 2 B. & P. 238. And it is not necessary that the name should be written after the writing of the agreement. One may write the contract on a piece of paper on which his name has been previously placed. The delivery of the memorandum shows the intention that the name should operate as a signature. And therefore, where the defendant had written, signed, and delivered a complete memorandum, and afterwards, at the plaintiff's request, made an alteration on the paper, for the purpose of correcting a mistake, and redelivered the paper to the plaintiff, it was *held*, that a signature to this alteration was unnecessary, because authenticated by the signature already on the paper. Bluck *v.* Gompertz, 7 Exch. 862. And *Pollock*, C. B. said: "We think that words introduced into a paper signed by a party, or an alteration in it, may be considered as *authenticated*, by a signature already on the paper, if it is plain that they were meant to be so authenticated. The act of signing after the introduction of the words is not absolutely necessary."

(*f*) Thus, in Stokes *v.* Moore, 1 Cox, 219, where an agreement was made for the renewal of a lease by the defendant to the plaintiff, and the defendant wrote instructions to an attorney, from whence the same was to be prepared, in the words following: "The lease renewed, Mrs. Stokes to pay the king's tax, also to pay Moore £24 a year, half yearly;" it was *held*, that this was not a memorandum signed within the statute. And *Skyner*, C. B., said: "The question in this case is, whether the written note stated in the pleadings is such an agreement as is within the meaning of the statute of frauds. These are instructions to the attorney for the preparation of the lease. This is no formal signature of the defendant's name, but one term of the instructions is, that the rent is to be paid to Moore; and the question is, whether the name so inserted and written by the defendant is a sufficient signing. The purport of the statute is manifest, to avoid all parol agreements, and that none should have effect but those signed in the manner therein specified. It is argued, that the name being inserted in any part of the writing is a sufficient signature. The meaning of the statute is, that it should amount to an *acknowledgement by the party* that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires. Here the insertion of the name has not this effect. This memorandum might be drawn subject to additions or alterations, and does not appear to be the final agreement of the parties, and indeed, as far as we can admit parol evidence, it is proved not to be so, for the subject of repairs is not mentioned in the instructions; which shows that the ends of the statute are not to be obtained, if so informal a paper is to be admitted as a written agreement. No case has been adduced in point, but it has been compared to the case of wills, where a name written in the introduction has been considered as a signature, but that seems to me a very different case. The cases on wills have been where the instrument, importing to be the final instrument of the party, has been formally attested, and it is in its nature complete, and the only question has been, whether the form of the statute has been complied with. In the present case I think it is by no means so, and it would be of very dangerous tendency to admit the memorandum to be an agreement within the statute." *Eyre*, B. "I think this cannot be considered such a signature as the statute requires. The signature is to have the effect of giving authenticity to the whole instrument, and if the name is inserted *so as to have that effect*, I do not think it signifies much in what part of the instrument it is to be found: it is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name

written, and a signature by the buyer at the foot of the entry was held to be a signature by both parties. (*g*)

The fact of the delivery of the instrument, as a promise, would have much weight in determining this question. If one wrote, "In consideration of, &c., I, A. B., promise to C. D. &.," and kept the paper in his own hands without signature, it might be supposed that he delayed signing it because he was not ready to make his promise and bind himself. So, if he gave it to the other party to examine and see if it was acceptable to him, or for any similar purpose, it would not be held to be signed by him. But if he gave the instrument written as above distinctly as his promise, then the signature would be held sufficient. Generally, this question could be determined by a construction of the instrument itself, aided however by the *res gestæ* which were admissible as evidence. In some of our States, the word of the statute is not "signed," but "subscribed;" and where this word is used, it is said that the signature must be at the end. (*h*) One may sign in the place where a witness usually signs, and under that name, and yet intend to sign as principal, and would of course be so regarded; but it has been also held, that if one signs actually as a witness, and with no other intention, yet with a full knowledge of the contents of the paper, and an approbation of them, it would be a sufficient signature to bind the party to the performance of any acts contained in the instrument which were necessarily to be performed by him in order to carry the instrument into effect. (*i*) And where one is in the habit of using instruments with his name printed in them, this will be his signature. (*j*) And so if

inserted in the middle of a writing can well have that effect; and there the name, being generally found in a particular place by the common usage of mankind, it may very probably have the effect of a legal signature, and extend to the whole; but I do not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, can amount to such an authentication as is required by the statute." See also, Cabot *v.* Haskins, 3 Pick. 83; Cowie *v.* Remfry, 10 Jur. 789.

(*g*) Sarl *v.* Bourdillon, 1 C. B. N. S. 188.

(*h*) Davis *v.* Shields, 24 Wend. 322, 26 id. 341; Vielie *v.* Osgood, 8 Barb. 130. But see *contra*, James *v.* Patten, id. 344.

(*i*) Welford *v.* Beazely, 3 Atk. 503, 1 Ves. 6; Coles *v.* Trecothick, 9 Ves. 234 But see Gosbell *v.* Archer, 2 A. & E 500.

(*j*) Saunderson *v.* Jackson, 3 Esp. 180, 2 B. & P. 238. In Schneider *v.* Norris, 2 M. & S. 286, it was *held*, that a bill of parcels in which the name of the vendor was printed, and that of the vendee written by the vendor, was a sufficient memorandum of the contract within the statute

he writes it in pencil. (*k*) And it is now quite settled, that the agreement need not be signed by both parties, but only by him who is to be charged by it. (*l*) And he is estopped from deny-

of frauds to charge the vendor. And Lord *Ellenborough* said: "I cannot but think that a construction, which went the length of holding, that in no case a printing or any other form of signature could be substituted in lieu of writing, would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If indeed this case had rested merely on the printed name, unrecognized by, and not brought home to, the party, as having been printed by him, or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written Norris & Co. with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract. I entertained the same opinion at the trial, and cannot say that it has been changed by the argument. It appears to me, therefore, that the printed name thus recognized is a signature sufficient to take this case out of the statute." *Le Blanc*, J.; "Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping, as it seems to me, if required to be done by the party himself or by his authority, would afford the same protection as signing."

(*k*) Merritt *v.* Clason, 12 Johns. 102; S. C. *nom.* Clason *v.* Bailey, 14 Johns. 484; Draper *v.* Pattina, 2 Speers, 292; McDowell *v.* Chambers, 1 Strobh. Eq. 347; Geary *v.* Physic, 5 B. & C. 234.

(*l*) It has been questioned whether the correct interpretation of the statute does not require the signature of both parties. In Lawrenson *v.* Butler, 1 Sch. & L. 13, Lord *Redesdale* thought, that specific performance of a contract should not be enforced against one party unless the other was bound also. "I confess," said he, "I have no conception that a court of equity ought to decree a specific performance in a case where nothing has been done in pursuance of the agreement, except where both parties had by the agreement a right to compel a specific performance, according to the advantage which it might be supposed that they were to derive from it; because otherwise it would follow, that the court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet if advantageous to him he could not compel a performance. This is not equity, as it seems to me. If indeed there was a concealment, or an ignorance of the facts, on the one part, and that thereby the other party was led into a situation from whence he could not be extricated, then he would have a right to have the agreement executed *cy pres;* that is, a new agreement is to be made between the parties." And see note to Sweet *v.* Lee, 3 Man. & G. 462. But it is now well settled, that the signature of the party charged in the action satisfies the requirement of the statute. Hatton *v.* Gray, 2 Ch. Cas. 164; Colman *v.* Upcott, Vin. Abr. tit. Contract and Agreement (I), pl. 17; Seton *v.* Slade, 7 Ves. 265; Fowle *v.* Freeman, 9 id. 351; Martin *v.* Mitchell, 2 Jac. & W. 426; Laythoarp *v.* Bryant, 2 Bing. N. C. 735; Egerton *v.* Mathews, 6 East, 307; Allen *v.* Bennet, 3 Taunt. 169; Schneider *v.* Norris, 2 M. & S. 286; Ballard *v.* Walker, 3 Johns. Cas. 60; Clason *v.* Bailey, 14 Johns. 484; McCrea *v.* Purmort, 16 Wend. 460; Shirley *v.* Shirley, 7 Blackf. 452; Penniman *v.* Hartshorn, 13 Mass. 87; Douglass *v.* Spears, 2 Nott & M'C. 207; Barstow *v.* Gray, 3 Greenl. 409. In Flight *v.* Bolland, 4 Russ. 298, where a bill was filed by an infant for the specific performance of a contract, Sir John *Leach* said: "No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a sup-

ing the execution of the instrument on the ground that it wants the signature of the other party. (*m*)

The signature may be made by an agent; (*n*) and the agent may write his own name instead of his principal's; (*o*) and a

posed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord *Redesdale*, upon the ground of want of mutuality. But these cases are supported, first, because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant." In Fenly *v.* Stewart, 5 Sandf. 101, the principle of the decisions upon this point was thus stated by *Mason*, J.. "This construction," said he, "has proceeded, not on the ground that contracts need not be mutual, but that the statute, in certain enumerated cases, has taken away the power of enforcing contracts, which would otherwise be mutually binding, unless the parties against whom they are sought to be enforced have subscribed some note or memorandum thereof in writing. If a mutual contract is made, and one of the parties to it gives the other a memorandum in pursuance of the statute, but neglects to take from that other a corresponding memorandum, he has but himself to blame if he is unable to compel its performance, while he is bound to the other party. The difficulty is not, that the contract as originally entered into, is not mutual, but that one of the parties has not the evidence which the statute has made indispensable to its enforcement. It necessarily follows, however, from the provision of the statute, that all inquiry as to whether or not a contract was originally mutual, is immaterial. It may be enforced against the party who has subscribed a note or memorandum of it, though the other party, by not having signed, is, by the express words of the statute, freed from its obligation." By the New York Revised Statutes, Part 2, ch. 7, tit. 1, § 8, it is enacted, that "every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed *by the party by whom the lease or sale is to be made.*" For the construction of this section, see Miller *v.* Pelletier, 4 Edw. Ch. 102; Coles *v.* Bowne, 10 Paige, 526; Champlin *v.* Parish, 11 Paige, 405; National Fire Insurance Co. *v.* Loomis, 11 Paige, 431; Worrall *v.* Munn, 1 Seld. 229.

(*m*) See cases cited in preceding note.

(*n*) Hawkins *v.* Chace, 19 Pick. 502; Hanson *v.* Rowe, 6 Foster, 327. And where a testator from illness was unable to write, and his signature was made by having his hand guided, this was held a signature. Wilson *v.* Beddard, 12 Simons, 28. The law, however, will not presume the authority to sign, but the agent must have an authority directly deducible from his employment, or a special authority to do that particular thing. Hawkins *v.* Chace, 19 Pick. 502; Dixon *v.* Broomfield, 2 Chitt. 205; Hodgkins *v.* Bond, 1 N. H. 284; Pitts *v.* Beckett, 13 M. & W. 743. In Graham *v.* Musson, 5 Bing. N. C. 603, the defendant, the purchaser of goods, requested one Dyson, the agent of the seller, to write a note of the contract in the defendant's book. Dyson did so, and signed the note with his own name. *Held*, that such note was not sufficient, under the statute of frauds, to bind the defendant. And per *Vaughan*, J., "The plaintiffs' case fails in their not showing that Dyson was the defendant's agent; it is unnecessary, therefore, to enter into the authorities which have been cited. Dyson, as agent for the plaintiffs, and the defendant, in requesting him to make the entry in his book, probably sought to fix the plaintiffs, but not to appoint Dyson as agent for himself." And the agent cannot delegate his authority to sign. Blore *v.* Sutton, 3 Meriv. 237; Henderson *v.* Barnewall, 1 Young & J. 387.

(*o*) And in such case parol evidence is admissible, to show the authority and bind the principal. Truman *v.* Loder, 11 A. & E. 589. In this case Lord *Denman* said: "Parol evidence is always necessary to show that the party sued is the person making the contract and bound

ratification of the signature would have the same effect as an original authority. (*p*) But the agency must be an agency for this purpose; for it would not be deemed the signature of a principal by an agent, although the party actually writing the name was for some purposes the agent of the other, if it was apparent from the paper itself that it was intended to complete the paper by the actual signature of the principal himself. (*q*) Nor can one of the contracting parties be the agent of the other for this purpose. (*r*) Though an auctioneer (*s*) or bro-

by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." And see Williams *v.* Bacon, 2 Gray, 387.

(*p*) Maclean *v.* Dunn, 4 Bing. 722.

(*q*) Thus, in Hubert *v.* Turner, 4 Scott, N. R. 486, an agreement was drawn by the defendants' agent which recited in the usual way the names of the contracting parties, and at the end were these words, "as witness our hands;" but it was never in fact signed. *Held*, that it was not sufficient to bind the defendants. And see *supra*, n. (*f*).

(*r*) Wright *v.* Dannah, 2 Camp. 203; Raynor *v.* Linthorne, 2 C. & P. 124. In Farebrother *v.* Simmons, 5 B. & Ald. 333, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased, it was *held*, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. And *Abbott*, C. J., said: "The question is, whether the writing down the defendant's name by the plaintiff, with the authority of the defendant, be in law a signing by the defendant's agent. In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the autioneer suing as one of the contracting parties. The case of Wright *v.* Dannah seems to me to be in point, and fortifies the conclusion at which I have arrived, namely, that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record." And in Coleman *v.* Garrigues, 18 Barb. 60, it was held, that a brother employed to make, or close a bargain, for the sale of real estate, is not authorized to sign the name of his principal to a contract for the sale of real estate, so as to take it out of the statute of frauds. The court say, "An agent within the meaning of the statute of frauds, who can sign the name of the owner of lands to a contract for its sale, is not one who has a mere authority to make a bargain for the sale; but one who is made the owner's agent to *sign* his name to the contract. That agency may be by parol, but it is not included in a mere authority to sell." But see Bird *v.* Boulter, 4 B. & Ad. 443, in which Farebrother *v.* Simmons, is somewhat questioned.

(*s*) It was formerly questioned whether auction sales were within the provisions of the statute of frauds. See Simon *v.* Motivos, 1 W. Bl. 599, 3 Burr. 1921. But it is now well settled that they are. Hinde *v.* Whitehouse, 7 East, 558; Blagden *v* Bradbear, 12 Ves. 466; Kenworthy *v.* Schofield, 2 B. & C. 945; Brent *v.* Green, 6 Leigh, 16; Davis *v.* Rowell, 2 Pick. 64; Burke *v.* Haley, 2 Gilman, 614; White *v.* Crew, 16 Ga. 416. It was the doctrine of the early cases that the auctioneer's authority to sign for both vendor and purchaser was confined to sales of personal property. Stansfield *v.* Johnson, 1 Esp. 101; Buckmaster *v.* Harrop, 7 Ves. 341; Walker *v.* Constable, 1 B. & P. 306. But it is now well settled that he is to be regarded as the agent of both parties equally in sales of real and of personal property. Coles *v.* Trecothick, 9 Ves. 234, 249; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt 209; Kenworthy *v.* Schofield, 2 B & C. 945;

ker's (*t*) may be for either. And for the purposes of the fourth and seventeenth sections, the agent may be authorized by parol

M'Comb *v.* Wright, 4 Johns. Ch. 659; Morton *v.* Dean, 13 Met. 385; Adams *v.* McMillan, 7 Port. 73; Meadows *v.* Meadows, 3 M'Cord, 458; Doty *v.* Wilder, 15 Ill. 407; Cleaves *v.* Foss, 4 Greenl. 1; Alna *v.* Plummer, id. 248; Anderson *v.* Chick, Bailey, Eq. 118. The doctrine formerly prevailed, that sales of land by sheriffs, and by masters in chancery under decrees of the court, were not within the statute. Attorney-General *v.* Day, 1 Ves. 218; Blagden *v.* Bradbear, 12 Ves. 466; Tate *v.* Greenlee, 4 Dev. 149. But this also has been since overruled, and sales of this description are now put upon the same footing with other auction sales. Simonds *v.* Catlin, 2 Caines, 61; Jackson *v.* Catlin, 2 Johns. 248; Ennis *v.* Waller, 3 Blackf. 472; Robinson *v.* Garth, 6 Ala. 204; Barney *v.* Patterson, 6 Harris & J. 182; Christie *v.* Simpson, 1 Rich. 407; Elfe *v.* Gadsden, 2 id. 373; Evans *v.* Ashley, 8 Mo. 177; Alexander *v.* Merry, 9 id. 514. — It is to be borne in mind, that the rule stated in the text, that an auctioneer is to be considered the agent for both parties, rests upon a mere presumption of fact, which may be rebutted by the particular circumstances of the case. Thus, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and he became the purchaser of goods, and was entered as such by the auctioneer, it was *held*, that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery. And Lord *Denman* said: "No doubt an auctioneer may be agent for both parties; but here the bargain was, that what the defendant should buy was to be set off against the legacy. We do not overrule the former cases; but we consider them inapplicable. The auctioneer is not *ex vi termini* agent for both parties; that depends upon the facts of the particular case." — The auctioneer's clerk is also regarded as the agent of both parties. Bird *v.* Boulter, 1 Nev. & M. 313; Frost *v.* Hill, 3 Wend. 386; Smith *v.* Jones, 7 Leigh, 165; Hart *v.* Woods, 7 Blackf. 568. But see *contra*, Meadows *v.* Meadows, 3 M'Cord, 458; Entz *v.* Mills, 1 McMullen, 453; Doty *v.* Wilder, 15 Ill. 407

(*t*) Rucker *v.* Cammeyer, 1 Esp. 105; Hicks *v.* Hankin, 4 Esp. 114; Chapman *v.* Partridge, 5 Esp. 256; Hinde *v.* Whitehouse, 7 East, 558; Hinckley *v.* Arey, 27 Me. 362. But the broker must be known by the party dealing with him to be a broker, acting in the capacity of broker, and not as principal. Shaw *v.* Finney, 13 Met. 453. In that case one Hathaway, a broker, whose business was to buy and sell fish, as well for himself as for others, was authorized by the plaintiffs to buy fish for them, and bargained with the defendant for a quantity of fish, intending to buy for the plaintiffs, but not intimating to the defendant that he was not buying for himself, and made the following written memorandum of the bargain: "October 21, 1846. F. agrees to sell H. his fare of fish, at \$2.50 per quintal, as they lay, or to go on flakes one good day, at \$2.62½; and to have the refusal of them until Friday evening, 23d instant." Hathaway gave notice to the defendant, before Friday evening, that he would take the fish at \$2.62½, they to be put on flakes one good day: the defendant refused to deliver the fish to Hathaway, and the plaintiffs brought this action against him for a breach of the contract. *Held,* that the case was within the statute of frauds, and that the action could not be maintained. And *Wilde*, J., said; "It is contended for the plaintiffs, that this was a contract between them and the defendant, and that, although Hathaway was employed by the plaintiffs only as their agent, yet, when the defendant dealt with him, he became his agent also, and that his memorandum of the agreement took the case out of the statute of frauds. . . . . Cases were cited from the English authorities, as to similar contracts made by brokers; but these authorities are not applicable to the present case. A broker in England is a known legal public officer, governed by statute; and those who deal with him are to find out who his principals are. He cannot act as principal without violating his oath; and he is also liable to a penalty if he does. 1 Tomlin's Law Dictionary, 274. Hathaway was engaged in buying and selling fish, as well for himself as for others; and it does not distinctly appear whether this purchase was made wholly for the plaintiffs or not. But however this may have been, the defendant did not deal with Hathaway as a

although, for the first and third, which relate to real property, his authority must be in writing. (*u*) We have seen that a broker may be an agent of either party, or of both, as to the statute of frauds; but a factor is only an agent of his principal. This distinction is more fully stated in the section on bought and sold notes.

As to the question what the written agreement must contain, the general answer is, all that belongs essentially to the agreement, (*v*) and more than this is not needed; nor can parol evi-

broker or agent, but as the contracting party; and if the defendant had himself signed the memorandum, he would not have been liable in this action by the plaintiffs; for the contract was in terms a contract with Hathaway." With respect to the entry of the broker in his private book, and the bought and sold notes delivered by him to the parties, the law is not altogether settled. It seems to be settled that the bought and sold notes constitute a sufficient memorandum, without any entry in the broker's book. Dickinson *v.* Lilwal, 1 Stark. 128; Rucker *v.* Cammeyer, 1 Esp. 105; Chapman *v.* Partridge, 5 id. 256; Hawes *v.* Forster, 1 Moody & R. 368; Goom *v.* Aflalo, 6 B. & C. 117; Sivewright *v.* Archibald, 17 Q. B. 103, 6 Eng. L. & Eq. 286. But for this purpose the bought and sold notes must correspond. Cumming *v.* Roebuck, Holt, N. P. 172; Grant *v.* Fletcher, 5 B. & C. 436; Gregson *v.* Ruck, 4 Q. B. 737; Thornton *v.* Kempster, 5 Taunt. 786; Peltier *v.* Collins, 3 Wend. 459. Where the broker has made an entry of the contract in his book, and has also delivered bought and sold notes to the parties, there has been a conflict of opinion as to whether the entry in the broker's book or the bought and sold notes constitute the contract. But the Court of Queen's Bench, in the recent case of Sivewright *v.* Archibald, 17 Q. B. 103, 6 Eng. L. & Eq. 286, held, that the entry is in such case the binding contract. See further upon this point, Townend *v.* Drakeford, 1 Car. & K. 20; per *Parke*, B., in Pitts *v.* Beckett, 13 M. & W. 746; Heyman *v.* Neal, 2 Camp. 337; Thornton *v.* Charles, 9 M. & W. 802; Thornton *v.* Meux, Moody & M. 43; Hawes *v.* Forster, 1 Moody & R. 368; Mews *v.* Carr, 1 H. & N. 484.

(*u*) Clinan *v.* Cooke, 1 Sch. & L. 22; Coles *v.* Trecothick, 9 Ves. 250; Mortlock *v.* Buller, 10 Ves. 292; Graham *v.* Musson, 7 Scott, 769; Waller *v.* Hendon, 2 Eq. Cas. Abr. 50, pl. 26; Vin. Abr. tit. Contract and Agreement (H), pl. 45; McWhorter *v.* McMahan, 10 Paige, 386; Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 1 Seld. 229; Alna *v.* Plummer, 4 Greenl. 258; Johnson *v.* Somers, 1 Humph. 268.

(*v*) Seagood *v.* Meale, Prec. in Ch. 560; Rose *v.* Cunynghame, 11 Ves. 550; Clerk *v.* Wright, 1 Atk. 12; Montacute *v.* Maxwell, 1 P. Wms. 618; Roberts *v.* Tucker, 3 Exch. 632; Archer *v.* Baynes, 5 Exch. 625; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Bailey *v.* Ogden, 3 Johns. 399; Waterman *v.* Meigs, 4 Cush. 497; Morton *v.* Dean, 13 Met. 385; Burke *v.* Haley, 2 Gilman, 614; Adams *v.* M'Millan, 7 Port. 73; Abeel *v.* Radcliff, 13 Johns. 297; Barickman *v.* Kuykendall, 6 Blackf. 21. — It must contain the *names of the parties*. Champion *v.* Plummer, 5 Esp. 240, 4 B. & P. 253. In this case the plaintiff had purchased of the defendant certain merchandise, which the defendant refused to deliver. The only memorandum of the bargain was a short note written by the plaintiff's clerk in a common memorandum-book, which was signed by the defendant, but made no mention of the name of the plaintiff. And *Mansfield*, C. J., said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff; there cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memoran-

dence be received to supply any thing which is wanting in the writing, to make it the written agreement on which the parties rely. (*w*) But much question has been made, whether the consideration is, in this respect, an essential part of the agreement. (*x*) By the early decisions of the English courts, since abundantly confirmed, it was settled in that country that the consideration must be expressed. (*y*) Or, in other words, that

dum in writing of a bargain." And see, to the same effect, Wheeler *v.* Collier, Moody & M. 123; Jacob *v.* Kirk, 2 Moody & R. 221; Sherburne *v.* Shaw, 1 N. H. 157; Webster *v.* Ela, 5 N. H. 540; Nichols *v.* Johnson, 10 Conn. 192. — It must contain a full and complete description of the subject-matter of the contract. Kay *v.* Curd, 6 B. Mon. 100. In Nichols *v.* Johnson, 10 Conn. 192, "B.'s right in C.'s estate" was held a sufficient description. And see the cases cited in the beginning of this note. — If a price has been agreed upon, that must be stated in the memorandum. Elmore *v.* Kingscote, 5 B. & C. 583; Acebal *v.* Levy, 10 Bing. 376; Blagden *v.* Bradbear, 12 Ves. 466; Smith *v.* Arnold, 5 Mason, 414; Ide *v.* Stanton, 15 Vt. 685; Adams *v.* M'Millan, 7 Port. 73; Waul *v.* Kirkman, 27 Miss. 823. But where a contract is entered into without any agreement as to price, the memorandum is sufficient, without any specification of price. Hoadly *v.* M'Laine, 10 Bing. 482. So an order for goods "on moderate terms," is a sufficient memorandum within the statute of frauds. Ashcroft *v.* Morrin, 4 Man. & G. 450.

(*w*) Salmon Falls M. Co. *v.* Goddard, 14 How. 446.

(*x*) *Ex parte* Minet, 14 Ves. 189; *Ex parte* Gardom, 15 id. 286; Morris *v.* Stacey, Holt, N. P. 153.

(*y*) Wain *v.* Warlters, 5 East, 10. In this case the defendant was sought to be charged upon the following undertaking: "Messrs. Wain & Co., I will engage to pay you by half-past four this day, fifty-six pounds and expenses on bill that amount on Hall. (Signed) Jno. Warlters." It was objected by the defendant, that though the promise, which was to pay the debt of another, was *in writing*, as required by the statute of frauds, yet that it did not express *the consideration* of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parol evidence; and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement to pay the debt of another without any consideration, and was therefore *nudum pactum* and void. And the court were of this opinion. Lord *Ellenborough* said: "In all cases where by long habitual construction the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question in the statute of frauds has the word *agreement*. And the question is, whether that word is to be understood in the loose, incorrect sense, in which it may sometimes be used, as synonymous to *promise* or *undertaking*, or in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect; the more so when it is considered by whom that statute is said to have been drawn, by Lord *Hale*, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged in the form of the proceeding against him, upon his special *promise*; but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the *promise*, which will account for the word *promise* being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood *the agreement in respect of which the promise was made*, must be reduced into writing. And indeed it

an agreement in writing, signed by the parties, did not satisfy the requirements of the statute, if it set forth all the promises of the parties, but did not state the consideration for them. In this country, it was doubted whether the consideration was in fact an essential part of the agreement; and in some States the judicial decisions have not only denied this, but the statutes have expressly declared the statement of the consideration unnecessary. (z) And if an action be brought on such agree-

seems necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain." This decision has been sustained in all the subsequent cases in England. See Stadt *v.* Lill, 9 East, 348; Lyon *v.* Lamb, Fell on Guaranties, App. No. 3; Jenkins *v.* Reynolds, 3 Brod. & B. 14; Saunders *v.* Wakefield, 4 B. & Ald. 595; Morley *v.* Boothby, 3 Bing. 107; Cole *v.* Dyer, 1 Cromp. & J. 461; James *v.* Williams, 3 Nev. & M. 196; Clancy *v.* Piggott, 4 id. 496; Raikes *v.* Todd, 8 A. & E. 846; Sweet *v.* Lee, 3 Man. & G. 452; Bainbridge *v.* Wade, 16 Q. B. 89; Powers *v.* Fowler, 4 Ellis & B. 571, 30 Eng. L. & Eq. 225. It will be seen that the above decisions depend upon the technical meaning attached to the word "agreement." Therefore, in cases arising under the seventeenth section, which does not contain the word "agreement," it has been held, that the consideration need not be expressed. Egerton *v.* Mathews, 6 East, 307. And see per *Alderson*, B., in Marshall *v.* Lynn, 6 M. & W. 118.

(z) The leading case in this country, in opposition to Wain *v.* Warlters, is Packard *v.* Richardson, 17 Mass. 122. In that case the action was brought on an undertaking of the defendants indorsed on a promissory note, and in the words following: "We acknowledge ourselves to be holden as surety for the payment of the within note." And the defendants were held liable. *Parker*, C. J., after stating that part of the fourth section of the statute upon which the question arose, said: "The obvious purpose of the legislature would seem to be, to protect men from hasty and inconsiderate engagements, they receiving no beneficial consideration; and against a misconstruction of their words by the testimony of witnesses, who would generally be in the employment and under the influence of the party wishing to avail himself of such engagements. To remove this mischief, the promise or engagement shall be in writing and signed; in order that it may be a deliberate act, instead of the effect of a sudden impulse, and may be certain in its proof, instead of depending upon the loose memory or biased recollection of a witness. The agreement shall be in writing; what agreement? The agreement to pay a debt, which he is under no legal or moral obligation to pay, but which he shall be held to pay, if he agrees to do it, and signs such agreement. This appears to be the whole object and design of the legislature; and this is effected without a formal recognition of a consideration; which, after all, is more of a technical requisition than a substantial ingredient in this sort of contracts. And it would seem further, that the legislature chose to prevent an inference that the whole contract or agreement must be in writing; for it is provided that some memorandum or note thereof in writing shall be sufficient. What is this but to say, that if it appear by a written memorandum or note, signed by the party, that he intended to become answerable for the debt of another, he shall be bound, otherwise not. How then is it

ment, the consideration may be proved by extrinsic evidence. In other States, however, the English rule has prevailed; (*a*) but it has been held, and is undoubtedly the prevailing rule, that although the consideration be not named as such, if it can be distinctly collected from the whole instrument what it really was, this satisfies the statute. (*b*)

Of the form of the agreement, it need only be said that it

possible, with these expressions in the statute, to insist upon a formal agreement, containing all the motives or inducements which influenced the party to become bound? Yet such is the decision of the Court of King's Bench, in the case of Wain *v.* Warlters." And the learned judge then proceeded to a minute examination of the decided cases, and arrived at the conclusion that the principle declared in Wain *v.* Warlters ought not to be sanctioned. See to the same effect, Sage *v.* Wilcox, 6 Conn. 81; Tufts *v.* Tufts, 3 Woodb. & M. 456; Reed *v.* Evans, 17 Ohio, 128; Gilligan *v.* Boardman, 29 Me. 79; Adkins *v.* Watson, 12 Texas, 199. And see How *v.* Kemball, 2 McLean, 103. Hargroves *v.* Cooke, 15 Ga. 321. See also, Mass. Rev. Stat. ch. 74, § 2. In some States also the language of the statute has been changed, the word promise or some other word being substituted for the word agreement. And the English doctrine, resting upon the technical meaning of the word agreement, has consequently been repudiated in those States. Violett *v.* Patton, 5 Cranch, 142; Taylor *v.* Ross, 3 Yerg. 330; Gilman *v.* Kibler, 5 Humph. 19; Wren *v.* Pearce, 4 Smedes & M. 91.

(*a*) Sears *v.* Brink, 3 Johns. 210; Rogers *v.* Kneeland, 10 Wend. 218; Packer *v.* Willson, 15 id. 343; Bennett *v.* Pratt, 4 Denio, 275; Staats *v.* Howlett, id. 559; Wyman *v.* Gray, 7 Harris & J. 409; Elliott *v.* Giese, 7 Harris & J. 457; Edelen *v.* Gough, 5 Gill, 103; Henderson *v.* Johnson, 6 Ga. 390. And such is now the statute law of New York. See 2 Rev. Stat. part 2, ch. 7, tit. 2, sect. 2; Miller *v.* Cook, 23 N. Y. (9 Smith) 495.

(*b*) Bainbridge *v.* Wade, 16 Q. B. 89, 1 Eng. L. & Eq. 236; Steele *v.* Hoe, 14 Q. B. 431; Goldshede *v.* Swan, 1 Exch. 154; Kennaway *v.* Treleavan, 5 M. & W. 498; Chapman *v.* Sutton, 2 C. B. 634; Haigh *v.* Brooks, 10 A. & E. 309; Newbury *v.* Armstrong, 6 Bing. 201; Shortrede *v.* Cheek, 3 Nev. & M. 866; Peate *v.* Dicken, 1 Cromp., M. & R. 322; Lysaght *v.* Walker, 5 Bligh, N. S. 1; Jarvis *v.* Wilkins, 7 M. & W. 410; Rogers *v.* Kneeland, 10 Wend. 218, 13 Wend. 114; Marquand *v.* Hipper, 12 Wend. 520; Waterbury *v.* Graham, 4 Sandf. 215; Laing *v.* Lee, 1 Spencer, 337. In the following cases the consideration did not sufficiently appear. Raikes *v.* Todd, 8 A. & E. 846; James *v.* Williams, 3 Nev. & M. 196; Bentham *v.* Cooper, 5 M. & W. 621; Clancy *v.* Piggott, 4 Nev. & M. 496; Jenkins *v.* Reynolds, 6 J. B. Moore, 86; Hawes *v.* Armstrong, 1 Scott, 661; Price *v.* Richardson, 15 M. & W. 539; Wain *v.* Warlters, 5 East, 10; Morley *v.* Boothby, 3 Bing. 107; Saunders *v.* Wakefield, 4 B. & Ald. 595; Jenkins *v.* Reynolds, 3 Brod. & B. 14. Even "value received" has been said to be enough. Watson *v.* McLaren, 19 Wend. 557; Day *v.* Elmore, 4 Wisc. 190; Cooper *v.* Dedrick, 22 Barb. 516. The consideration may be collected from the whole instrument, and may be inferred from its character as well as its terms. It need not therefore be expressed in a guaranty written upon a contemporaneous agreement expressing a consideration; for the agreement and the guaranty of its performance being contemporaneous, the consideration for the one enures to and sustains the other. Bailey *v.* Freeman, 11 Johns. 221. Hanford *v.* Rogers, 11 Barb. 18. So, too, if the agreement upon which the contemporaneous guaranty is written itself imports a consideration; as if it be an instrument under seal, or a promissory note. Leonnard *v.* Vredenburgh, 8 Johns. 29; Manrow *v.* Durham, 3 Hill, 584; Childs *v.* Barnum, 11 Barb. 14. The words "value received" have been held sufficiently to express a consideration. Watson *v.* McLaren, 19 Wend. 557; Douglass *v.* Howland, 24 Wend. 35; Edelen *v.* Gough, 5 Gill, 103. Where the words import either a past or a concurrent consideration, the latter construction will be given. See cases cited at the beginning of this note.

must be adequately expressive of the intent and obligation of the parties. It may be one or many pieces of paper; provided that the several pieces are so connected by mutual reference or otherwise that there can be no uncertainty as to the meaning and effect of them all, when taken together and viewed as a whole. (*c*) But this connection of several parts cannot be established by extrinsic evidence. (*d*) If there is an agreement on one paper, and something additional on another, and a signature on another paper, that is not a written and signed agreement, unless these several parts require by their own statement the union of the others; for if they may be read apart, or in other connections, evidence is not admissible to prove that they were actually intended to be read together. In general, the written agreement must be certain; but it may be certain in itself; (*e*) that is, it may itself declare the purposes and promises of the agreement definitely; or it may be capable of being made certain by reference to a certain standard. (*f*) If a contract be in its nature entire, and in one part it satisfies the statute, and in others does not, then it is altogether void. (*g*) But

(*c*) Brettel *v.* Williams, 4 Exch. 623; Tawney *v.* Crowther, 3 Bro. Ch. 318; Saunderson *v.* Jackson, 2 B. & P. 238; Foster *v.* Hale, 3 Ves. 696; 5 id. 308; Western *v.* Russell, 3 Ves. & B. 187; Allen *v.* Bennett, 3 Taunt. 169; Ide *v.* Stanton, 15 Vt. 685; Toomer *v.* Dawson, Cheves, 68. See also, Ridgway *v.* Warton, 6 H. L. Cas. 238.

(*d*) Clinan *v.* Cooke, 1 Sch. & L. 22; Brodie *v.* St. Paul, 1 Ves. 326; Ide *v.* Stanton, 15 Vt. 685; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273.

(*e*) Abeel *v.* Radcliff, 13 Johns. 297; Dodge *v.* Lean, id. 508; Nichols *v.* Johnson, 10 Conn. 192.

(*f*) Owen *v.* Thomas, 3 Mylne & K. 353. In this case an agreement in writing for the sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement. The court held the agreement sufficiently certain, if it could be ascertained, by an inquiry before the master, that the deeds in the possession of the person named referred to the house in question.

(*g*) Cooke *v.* Toombs, 2 Anstr. 420; Lea *v.* Barber, id. 425, n.; Chater *v.* Beckett, 7 T. R. 201; Vaughan *v.* Hancock, 3 C. B. 766; Lexington *v.* Clarke, 2 Vent. 223; Mechelen *v.* Williams, 7 A. & E. 49; Thomas *v.* Williams, 10 B. & C. 664; Harman *v.* Reeve, 18 C. B. 587; Loomis *v.* Newhall, 15 Pick. 159. In Irvine *v.* Stone, 6 Cush. 508, it was *held*, that a contract for the purchase of coals at Philadelphia, and to pay for the freight of the same to Boston, if void by the statute of frauds as to the sale, is void also, and cannot be enforced, as to the freight; though the latter part, if it stood alone, would not be within the statute. The declaration in this case contained the common counts, and also a special count. And *Metcalf*, J., after showing that the plaintiff could not recover on the special count, on the ground of variance, said: "The remaining question is, whether the good part of the contract before us can be separated from the bad, so that the plaintiff can enforce the part which is good, on his general counts. And we are of opinion that, from the nature of the contract, this cannot be done. It is in its nature entire. The part which respects the transportation stands wholly on the other part which respects the sale, and which is invalid; and both must fall

if these parts are severable, then it may be good in part, and void in part. (*h*)

If a contract in writing be sued, it may be shown in defence that the contract has been altered, orally, by agreement. But if the plaintiff sues on a written contract, and must show oral

together. The transporting of the coal, apart from the sale of it, was of no benefit to the defendants, and could not have been contemplated by either party as a thing to be paid for or to be done, except in connection with the sale. The case therefore does not fall within the principle advanced by the counsel for the plaintiff, and sustained by the authorities. The good part of the contract cannot practically be severed from the bad, and separately enforced." So where an agreement was made for the sale by the plaintiff to the defendant of the plaintiff's crop of hemp, then on hand, and in like manner his crops to be raised the two succeeding years, it was held, that the whole contract came within the statute of frauds, as a contract not to be performed within the space of one year; and that the part of the contract which related to the crop of hemp on hand, could not be severed from the rest. So in Thayer *v.* Rock, 13 Wend. 53, it was *held*, that a contract made as well for the sale of *real* as of *personal* property, which is entire, founded upon one and the same consideration, and is not reduced to writing, is void, as well in respect to the personal as the real property, the subject of the contract. See also, *ante*, vol. 1, p. 454. And see next note.

(*h*) Mayfield *v.* Wadsley, 3 B. & C. 357. In Wood *v.* Benson, 2 Cromp. & J. 94, an action was brought by the clerk of the Manchester Gas Works, on the following guaranty, signed by the defendant: "I, the undersigned, do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. Neville; and I do also agree to pay for all arrears which may be now due." The declaration contained the common counts. It was objected by the defendant, 1st, that there was no consideration apparent on the face of the instrument for the promise to pay the arrears; and, 2d, that the agreement being therefore void as to part under the statute of frauds, was void as to the whole. And in support of the second objection, he cited Lea *v.* Barber, Lexington *v.* Clarke, Chater *v.* Beckett, and Thomas *v.* Williams. But the objection was not sustained. *Bayley*, B., said: "I take it to be perfectly clear that an agreement may be void as to one part, and not of necessity void as to the other. There are many cases in the books where a contract has been held good in part and bad in part. A bond may be good, though the condition is good in part and illegal in part. I am therefore of opinion that it by no means follows that, because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good. In each of the cases referred to for the purpose of showing that the contract, if void in part, was void *in toto*, there was a failure of proof. The declaration in each of those cases stated the entire promise, as well that part which was void as that which was good. I think, therefore, that these cases are to be supported on the principle of the failure of proof of the contract stated in the declaration; but that they do not establish that, if you can separate the good part from the bad, you may not enforce such part of the contract as is good. I am therefore of opinion, that the verdict must stand for the amount of the gas subsequently supplied." To the same effect as Rand *v.* Mather, 11 Cush. 1 That was an action for work and labor on three houses belonging to the defendant. The plaintiff began his work under a contract with one Whiston, who was building the houses for the defendant. Whiston failed, and the plaintiff refused to go on with his work. The defendant then told the plaintiff to proceed with his work, and he would pay him for what he had done, as well as for what he should do. The plaintiff then went forward and finished his work. The declaration contained the common counts. It was objected by the defendant, that as a part of the contract was clearly within the statute of frauds, the whole must fail. But the objection was overruled, and the court held, in conformity with Wood *v.* B

alteration in order to maintain his action, this is no compliance with the statute. (*i*)

Let us now look at the particular clauses of the fourth and seventeenth sections.

The first clause relates to the promise of an executor or administrator to answer damages out of his own estate. In regard to this it has been held, that where an executor gives a bond to the judge of probate to pay debts and legacies, this is an admission of assets, and estops him from denying them; and therefore a promise by him to pay a debt of the testator will be taken to pay it out of sufficient assets, and therefore not to be a promise "to answer damages out of his own estate," and consequently not within the statute; and it need not be in writing. (*j*) In those States in which the written agreement or memorandum should contain the consideration, some new consideration must be shown; but a very slight consideration suffices.

There is said to be this difference between an executor and an administrator. An executor derives his title from the will of his testator, and the office and interest are completely vested in him, by the testator's death, and his promise is within the statute, although made before probate of the will. But an administrator derives title from the probate; and if he make a promise in expectation of administration, but before the actual grant, this promise is not within the statute, although he subsequently becomes administrator. (*k*)

The second clause relates to a promise "to answer for the debt, default, or miscarriage of another person." This clause covers all guaranties, and is of great importance in reference to them. Its general effect is, to make it necessary that all collateral promises should be in writing. The distinction between those which are collateral and those which are original has already been considered; and it is sufficient to say, in this connection, that only when the promise is distinctly collateral, is it

plaintiff was entitled to recover for the work done subsequent to the defendant's promise.

(*i*) Dana *v.* Hancock, 30 Vt. 616.

(*j*) Stebbins *v.* Smith, 4 Pick. 97. But see Silsbee *v.* Ingalls, 10 id. 526.

(*k*) Tomlinson *v.* Gill, Ambl. 330.

within this clause of the statute. (*l*) Nor is it then material whether the promise is made before or after the delivery of the goods. (*m*)

From the very definition of a collateral promise, it follows that there must be some one who owes the debt directly. There must exist an original liability, as the foundation for the collateral liability. And one of these liabilities must be entirely distinct from the other. If therefore the creditor trusted to one of the parties more than to the other, but did in fact trust to one together with the other, it is not within the statute. And in ascertaining whether this original and distinct liability exists, and then a collateral one founded upon it, the court will look to the intentions of the parties, as they may be inferred from all the circumstances of the case and of the parties. (*n*) At the

(*l*) In the absence of evidence showing distinctly that a promise is collateral, it will be treated as an original promise. This point is well illustrated by the case of Beaman *v.* Russell, 20 Vt. 205. That was an action on a written instrument signed by the defendant, whereby he agreed with the plaintiff to indemnify him for signing, together with three other persons, two promissory notes payable to the Bank of Rutland. It appeared that the notes in question were discounted by the Bank of Rutland; that they were not paid at maturity, and were afterwards paid by the plaintiff. It was objected by the defendant that the promise was within the statute of frauds, as being a collateral promise, and was therefore not binding, because no consideration appeared on the face of the written instrument. But the objection was not sustained. And *Hall*, J., said: "Although the decisions upon the clause of the statute relied upon by the defendant are not all reconcilable with each other, yet it seems agreed in all the cases, that if the promise is not collateral to the liability of some other person to the same party, it is not within the statute. Eastwood *v.* Kenyon, 11 A. & E. 438. In this case, unless there was some person liable to indemnify the plaintiff for signing the notes to the Bank of Rutland, other than the defendant, his undertaking was an original and not a collateral one. Does it appear from the writing offered in evidence, either in connection with the notes or without them, that any other person than the defendant was in any manner liable to the plaintiff? If the plaintiff had signed the notes with the other makers of them, as their surety and at their request, the law would have implied a promise from them, to indemnify him. But there is no evidence that he signed as surety. For aught that appears, the liability to the Bank of Rutland might have been incurred for the sole benefit of the defendant, and he might have agreed to indemnify the other signers in the same manner that he did the plaintiff. Besides, there is no proof that the plaintiff signed the note at the request of the other signers. The writing shows that he signed at the request of the defendant, and on his promise to indemnify him; and this fact would be calculated to rebut any presumption that he signed at the request of the others, even if his name had appeared on the notes as surety. In the absence of all evidence that there was a liability of any other person to the plaintiff, to which the defendant's promise could have been collateral, it must be treated as an original promise not within the statute."

(*m*) Matson *v.* Wharam, 2 T. R. 80; Jones *v.* Cooper, Cowp. 227; Peckham *v.* Faria, 3 Doug. 13; Bronson *v.* Stroud, 2 McMullan, 372.

(*n*) Keate *v.* Temple, 1 B. & P. 158. In this case the defendant, the first lieutenant of his majesty's ship, the *Boyne*, applied to the plaintiff, a slop-seller, to furnish the crew with new clothes, saying that he would see him paid at the pay table. The plain

same time, however, it must be remembered, that the expressions used by the parties are the first and the most direct evidence of their intention; and the proper effect and construction of the various expressions used in transactions of this kind are well illustrated by Lord *Holt*. (*o*)

It is quite certain, as has been said, that the party *for* whom the promise has been made must be liable to the party *to* whom it is made; (*p*) and it is equally necessary that he con-

tiff having supplied the clothes, and the *Boyne* having been afterwards burnt and the crew dispersed, this action was brought against the defendant to recover the amount. The plaintiff having obtained a verdict for £576 7*s*. 8*d*., a new trial was ordered. And *Eyre*, C. J., upon the occasion of making the rule for a new trial absolute, placed much stress upon the fact that clothes to so large an amount were furnished, and also upon the peculiar relation in which the defendant stood to the crew. "There is one consideration," said he, "independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to the jury. The sum recovered is £576 7*s*. 8*d*. And this against a lieutenant in the navy; a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or *of the slop-seller to furnish the goods on his credit*, to so large an amount. I can hardly think, that had the *Boyne* not been burnt, and the plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. . . . . From the nature of the case it is apparent that the men were to pay in the first instance; the defendant's words were, 'I will see you paid at the pay table; are you satisfied?' and the answer then was, 'Perfectly so.' The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, whether the slop-man did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able o raise so large a sum." So in the case of Norris *v*. Spencer, 18 Me. 324, the court declare that whether the contract of one who engages to be responsible for another, is to be regarded as an original and joint, or as a collateral one, must depend upon the intention of the parties, to be ascertained from the nature of it, and the language used. And see Moses *v*. Norton, 36 Me. 113; Beebe *v*. Dudley, 6 Foster, 249; Bushee *v*. Allen, 31 Vt. 631.

(*o*) Watkins *v*. Perkins, 1 Ld. Raym. 224. "If," said he, "A promise B, being a surgeon, that if B cure D of a wound, he will see him paid; this is only a promise to pay if D does not, and therefore it ought to be in writing, by the statute of frauds. But if A promise in such case that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing." And in Norris *v*. Spencer, 18 Me. 324, already cited, where a written contract was made in form between two, and signed by the parties named, and at *the same time* a third person added "I agree to be security for the promisor in the above contract," with his signature, the latter was held as a joint promisor.

(*p*) It is now well settled, that in order to bring a promise within this clause of the statute, it must be made to the party to whom the person undertaken for is liable. "The statute," says *Parke*, B., in Hargreaves *v*. Parsons, 13 M. & W. 561, "applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee*." A promise, therefore, by A to B, to pay a debt due from B to C, is not within the statute. This last point was first presented for adjudication in Eastwood *v*. Kenyon, 11 A. & E. 438. The facts in that case were, that the plaintiff was liable to one Blackburn on a promissory note; and the de-

tinue liable after the making of the promise. In other words the promise of the party undertaking must not have the effect,

fendant, for a consideration, promised the plaintiff to pay and discharge the note to Blackburn. And Lord *Denman* said, "If the promise had been made to Blackburn, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not the less the debt of another, because the promise is made to that other, namely, the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration, we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one." And see, to the same effect, Hargreaves *v.* Parsons, 13 M. & W. 561; Pearce *v.* Blagrave, C. B. 1855, 30 Eng. L. & Eq. 510; Pratt *v.* Humphrey, 22 Conn. 317; Barker *v.* Bucklin, 2 Denio, 45; Westfall *v.* Parsons, 16 Barb. 645; Preble *v.* Baldwin, 6 Cush. 549; Alger *v.* Scoville, 1 Gray, 391; Perkins *v.* Littlefield, 5 Allen, 370. And in New York it has been held, that the creditor may sue on such a promise made to his debtor, on the ground that he is the person for whose benefit the contract is made. See Barker *v.* Bucklin, 2 Denio, 45. But see *contra*, Curtis *v.* Brown, 5 Cush. 488. It has been made a question, whether a promise by A to indemnify B for guaranteeing a debt due from C to D is within the statute. It is clear, upon the authorities already cited, that such a promise is not within the statute, as being a promise to answer for the debt of C. For that purpose it must have been made to D, to whom the debt was due. And upon this ground it was held, when the question was first presented in Thomas *v.* Cook, 8 B. & C. 728, that such a promise was not within the statute. And *Bayley*, J., said: "A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." And see, to the same effect, Jones *v.* Shorter, 1 Ga. 294; Chapin *v.* Merrill, 4 Wend. 657. But in the more recent case of Green *v.* Cresswell, 10 A. & E. 453, a different view was taken of the question, namely, that the person for whom the guaranty is given is under an implied contract to indemnify his guarantor, and that A's promise to indemnify is collateral to this, and therefore within the statute. And the same view was adopted in Kingsley *v.* Balcome 4 Barb. 131. But in other cases it is held, that such a contract is not within the statute, even upon this last view. See Holmes *v.* Knights, 10 N. H. 175; Dunn *v.* West, 5 B. Mon. 376; Lucas *v.* Chamberlain, 8 id. 276. The question would seem to depend upon the time when the promise of C, the person for whom the guaranty is given, arises. And this again will depend upon the particular circumstances of the case. If these are such as to authorize the inference that C made an *actual promise* to indemnify his guarantor at the time when the undertaking of A was given, or prior thereto, the reasonable presumption is that the promise of A was intended to be collateral. If, on the other hand, there is nothing in the case from which an *actual promise* by C can be inferred, and he can only be made liable on a promise raised by operation of law, from B's having been compelled to pay money on his account, it would seem to be clear that the promise of A must be original. For the promise of C arises upon a subsequent and independent fact, after the promise of A has become a complete and valid contract. — Upon the principle stated in the text, it was *held*, in Bushell *v.* Beavan, 1 Bing. N. C. 103, that a promise by A, that B should guarantee the debt of C, was not within the statute. In that case the defendant undertook that one Macqueen should guarantee to the plaintiff the payment of certain freight due to him under a charter-party from one Lempill. And *Tindal*, C. J., said: "The contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person, but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen had signed the guaranty, that guaranty would, indeed, have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due under the charter-party, if Lempill did not pay it. But no person could be answerable on the promise to procure his signature but

prior to its performance, of discharging the party originally liable. Thus, if goods have been furnished by B to C, and charged to the latter, and A now becomes responsible for them, and B thereupon discharges C, looking to A only, and does this with the knowledge and consent of the parties, this promise of A is to be regarded as an original promise, by way of substitution for the promise of C, which it satisfies and discharges, and not as collateral to the promise of C. (q) On the other hand, if the liability of the original party is to continue *after* the performance of the promise, the promise is equally out of the statute. For that cannot properly be called a promise to answer for the debt, default, or miscarriage of another person, the performance of which leaves the liability of that other person the same as before. (r)

the defendant. Lempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was, therefore, no default of any one for which the defendant made himself liable; but he did so simply upon his own immediate contract. For as to any default of Lempill in paying the freight, the action on the undertaking of the defendant could not be dependent on that event; for it would have been maintainable if the guaranty were not signed at any time after the day on which the defendant engaged it should be given, that is, long before the time when the freight became payable." The same principle was applied in Jarmain *v.* Algar, 2 C. & P. 249. There the defendant promised to execute a bail bond in an action by the plaintiff against one Flack, in consideration that the plaintiff would not cause Flack to be arrested. The defendant's promise was held not to be within the statute, because Flack, the person undertaken for, was not liable. It should be observed, however, that Mr. Justice *Cowen*, in Carville *v.* Crane, 5 Hill, 483, was of opinion that these two cases proceeded upon too literal a construction of the statute.

(q) Thus, where the defendant promised to pay the debt of his son, who was in custody on an execution at the suit of the plaintiff, in consideration of his son's being discharged out of custody with the plaintiff's consent, it was held that the promise was not within the statute, because by such discharge the debt of the son was extinguished. Goodman *v.* Chase, 1 B. & Ald. 297; Lane *v.* Burghart, 1 Q. B. 933. So in Curtis *v.* Brown, 5 Cush. 488, 492, *Shaw*, C. J. says: "When, by the new promise, the old debt is extinguished, the promise is not within the statute; it is not then a promise to pay the debt of another, which has accrued, but it is an original contract, on good consideration, and need not be in writing." And see, to the same effect, Bird *v.* Gammon, 3 Bing. N. C. 883; Butcher *v.* Steuart, 11 M. & W. 857; Decker *v.* Shaffer, 3 Ind. 187; Emerick *v.* Sanders, 1 Wis. 77; Draughan *v.* Bunting, 9 Ired. 10; Stanly *v.* Hendricks, 13 id. 86; Bason *v.* Hughart, 2 Texas, 476. And see also, *ante*, vol. 1, pp. 217, 220.

(r) Stephens *v.* Squire, 5 Mod. 205, Comb. 362. In this case it appeared that an action had been brought against the defendant, an attorney, and two others, for appearing for the plaintiff without a warrant. The cause was carried down to be tried at the assizes; and the defendant promised, in consideration the plaintiff would not prosecute the action, that he would pay ten pounds and costs of suit. And now an action was brought against the defendant upon this promise. Sir Bartholomew *Shower*, for the defendant, objected that the promise was within the statute. *Holt*, C. J., "No, 'tis an original promise, and himself was liable." *Shower*, "What if himself had not been a party, then it were plainly within the statute." *Holt*, C. J., "Put that case when it

So, if the debt for which one engages to answer, is to be kept alive, but to be held for the benefit of the guarantor, the case is out of the statute. Thus, where one purchases the debt of another by his own promise, as if A promised to pay B a thousand dollars in three months, and thereupon B transferred to him C's debt to B for twelve hundred dollars, payable in a year, this certainly is a purchase of a debt, and not a promise to pay the debt of another. (*s*)

It may indeed be stated as a general rule, that wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another. (*t*) There are several classes of cases which may perhaps be more satisfactorily explained upon this principle than

comes; but if A saith, do not go on against B, &c., this being to be performed within a year, it will bind him; 'tis like the case of buying goods for another man, which is every day's practice. But if A saith, do not go on against B and I'll give you ten pounds *in full satisfaction of that action*, that might be within the statute; but here he appears to be a party concerned in the former action." It will be seen that one of the grounds upon which his lordship thought the case to be out of the statute, was that the defendant was one of the parties originally liable. This position will be noticed hereafter. But he was also of opinion that the case would have been out of the statute, though the defendant had not been concerned in the former action, for the reason that it did not appear that the ten pounds were to be paid *in satisfaction*. In other words, the liability of the original party would have still continued, notwithstanding the performance of the defendant's promise. And see Noyes *v.* Humphreys, 11 Grat. 636. This is also, we think, the true ground of the decision in Read *v.* Nash, 1 Wilson, 305. It there appeared that one Tuack, the plaintiff's testator, had brought an action of assault and battery against one Johnson. The cause being at issue, the record entered, and just coming on to be tried, the defendant Nash, being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, promised to pay him fifty pounds and costs. It was *held*, that the defendant's promise was out of the statute. It has sometimes been supposed, that the judgment of the court in this case proceeded upon the ground, that a promise to answer for a tort committed by another was not within the statute. And some of the language attributed to the Lord Chief Justice would seem to justify this opinion. But so far as the decision was based upon this ground, it cannot now be regarded as law, as we shall hereafter show.

(*s*) Thus, where A being insolvent, a verbal agreement was entered into between several of his creditors and B, whereby B agreed to pay the creditors 10*s*. in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to B; — it was *held*, that this agreement was not within the statute of frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. Anstey *v.* Marden, 4 B. & P. 124.

(*t*) This rule is very clearly stated and fully illustrated by *Shaw*, C. J., in Nelson *v.* Boynton, 3 Met. 396. He there says: "The terms original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases, where the direct and leading

upon any other. Thus, if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien, this promise is not within the statute. (*u*) The performance of the promise, it is true, will have the effect of discharging the original debtor; but there is no reason to suppose that this constituted, in any degree, the inducement to the promise, or was at all in the contemplation of the promisor. So if A, who is indebted to B, assigns to him in payment a debt due from himself to C, with a guaranty that C shall pay it to B when it becomes due, the transaction is not within the statute. For although the undertaking of A is in form a promise to answer for the debt of another, his object is merely to pay a debt of his own in a particular way. (*v*) And, generally, a

object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or promote some interest or purpose of his own. The former, whether made before or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor." And see Alger *v.* Scoville, 1 Gray, 391.

(*u*) The leading case upon this point is Williams *v.* Leper, 3 Burr. 1886. There one Taylor, a tenant to the plaintiff, being in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed the defendant, as a broker, to sell the effects; and accordingly he advertised a sale. On the morning of the sale, the plaintiff came to distrain the goods in the house; whereupon the defendant promised to pay the arrear of rent, if he would desist from distraining; and he did thereupon desist. Upon these facts the court *held*, that the defendant's promise was not within the statute. To the same effect is Houlditch *v.* Milne, 3 Esp. 86. There the plaintiff had in his possession certain carriages belonging to one Copey, upon which he had a lien for repairs. The defendant, in consideration that the plaintiff would relinquish his lien, and give up the carriages to him, promised to pay the plaintiff the amount due him. And Lord *Eldon held* the case to be out of the statute, on the principle established by Williams *v.* Leper. And see further, Barrell *v.* Trussell, 4 Taunt. 117; Slingerland *v.* Morse, 7 Johns. 463; Hindman *v.* Langford, 3 Strobh. 207; Blount *v.* Hawkins, 19 Ala. 100; Allen *v.* Thompson, 10 N. H. 32, cited *ante*, vol. II. p. 9, note (*t*); Randle *v.* Harris, 6 Yerg. 508, cited *ante*, vol. II. p. 10, note (*v*).

(*v*) Thus, in Johnson *v.* Gilbert, 4 Hill, 178, the defendant being indebted to one Sherwood in the sum of twenty-five dollars, the plaintiff, at the defendant's request, paid that debt, in consideration whereof the defendant transferred to the plaintiff the note of one Eastman, payable to himself. The defendant also indorsed upon the note a guaranty that it would be paid; and upon this guaranty the action was brought. It was *held*, that the case was not within the statute of frauds. *Bronson*, J., said: "The statute of frauds has nothing to do with the case. That only applies where the person making the promise stands in the relation of a surety for some third person, who is the principal debtor. This was not an undertaking by the defendant to pay the debt of Eastman, but it was an agreement to pay his own debt in a particular way. The plaintiff had, upon request, paid a debt of twenty-

promise to pay one's own debt, to a third party, as by A, to pay to C, at B's request, a debt due from A to B, is not within the statute. (*w*) Nor a promise to pay over as directed money remitted or collected, and belonging to the party directing. (*x*)

So where one, being interested in the property of another, enters into a written contract with a builder, for a valuable consideration, to finish certain work upon that property, by a specified time, there being at the same time a subsisting contract between the builder and owner of the property for doing the same work for a price to be paid by the owner, the last contract will not be regarded as a special promise for the debt of another. And if the builder, having failed to perform his latter agreement by the time specified, offers to prove an oral waiver of the time, and variation of the terms, he will not be prevented on the ground of the statute of frauds. (*y*)

If one of several persons, who are liable jointly or severally for the payment of the same debt, promises the creditor to pay the debt, this is not a case within the statute; for although the performance of the promise will have the effect of discharging others, it is to be presumed that the thing in the contemplation of the promisor was his own discharge. Thus, in the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; but the moving consideration is the discharge ot the party himself, and not of the rest, though that also ensues. (*z*) Again, it is now well settled that the guaranty of a

five dollars which the defendant owed to Sherwood, and had thus made himself a creditor of the defendant to that amount. If the matter had not been otherwise arranged, the plaintiff might have sued the defendant, and recovered as for so much money paid for him on request. But the plaintiff agreed to accept payment in a different way, to wit, by the transfer of Eastman's note for the wood-work of a wagon, with the defendant's undertaking that the note should be paid. The defendant, instead of promising that he would pay himself, agreed that Eastman should pay. He might do that, whether Eastman was his debtor or not; and the fact that Eastman was a debtor, does not change the character of the defendant's undertaking, and make it a case of suretyship within the statute of frauds." The same point was decided by the New York Court of Appeals, in Brown *v.* Curtiss, 2 Comst. 225; and Durham *v.* Manrow, id. 533. It is to be observed also, that cases of this description are out of the statute, upon the principle established by Eastwood *v.* Kenyon, 11 A. & E. 438; and Hargreaves *v.* Parsons, 13 M. & W. 561. See *supra*, note (*p*).

(*w*) Antonio *v.* Clissey, 3 Rich. 201; Blunt *v.* Boyd, 3 Barb. 209; Barker *v.* Bucklin, 2 Denio, 45.

(*x*) Wyman *v.* Smith, 2 Sandf. 331; Prather *v.* Vineyard, 4 Gilman, 40.

(*y*) Emerson *v.* Slater, 22 How. 28.

(*z*) Per Lord *Ellenborough*, in Castling *v.* Aubert, 2 East, 325. And see Files *v.* McLeod, 14 Ala. 611. And see *supra*, note (*r*).

factor selling upon a *del credere* commission, is not within the statute. This may be referred to the same principle. Although such a contract "may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." (*a*)

It may be further stated, that this clause of the statute does not embrace cases in which the liability to pay the debt of another arises, by operation of law, out of some transaction between the parties, without the aid of any *special promise.* Thus, if A, who is indebted to B, sends money to C to pay the debt, and C accepts the trust, he thereby becomes liable to B for the debt of A. (*b*) So if property is delivered to B, clothed with a trust for the payment of the debt of C, and B consents to receive the property subject to the trust, he thereby becomes liable to pay the debt. (*c*) But in cases falling within this principle, it is obvious that the party accepting the trust can be made liable only to the extent of the value of the property

(*a*) Per *Parke*, B., in Coutourier *v.* Hastie, 8 Exch. 40, 16 Eng. L. & Eq. 562. It was declared by the Court of Exchequer, in this case, that such a contract is not within the statute. Such may now, therefore, be considered as the settled doctrine in the English and American law. See *ante*, vol. 1, p. 92, n. (*d*), and vol. II. p. 12, n. (*a*). See Malory *v.* Gillett, 21 N. Y. (7 Smith), 412, for a classification of cases not within the statute, by *Comstock*, C. J.

(*b*) Wyman *v.* Smith, 2 Sandf. 331. And see Stocking *v.* Sage, 1 Conn. 519.

(*c*) Drakeley *v.* Deforest, 3 Conn. 272. This was one of the grounds upon which Williams *v.* Leper, 3 Burr. 1886, was decided. For the facts of the case see *supra*, n. (*u*). The plaintiff had a lien upon the goods of his debtor for the payment of his debt; and the defendant, in consideration that the plaintiff would relinquish the goods to him, consented to receive them subject to the lien. Lord *Mansfield*, in delivering his opinion, said: "This case has nothing to do with the statute of frauds. The *res gestæ* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge. He enters to distrain; he has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff paid, in the first place. The goods are the *fund.* The question is not between Taylor and the plaintiff. The plaintiff had a *lien* upon the *goods.* Leper was a trustee for all the creditors; and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds." And *Wilmot*, J., said: "Leper became the *bailiff* of the landlord; and when he had sold the goods, the money was the landlord's (as far as 45*l.*) in his own bailiff's hands. Therefore an action would have lain against Leper for money had and received to the plaintiff's use." The principle was stated still more pointedly by *Aston*, J., who concurred with the rest of the court upon this ground alone. He said: "I look upon the *goods* here to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45*l.* The goods were a *fund between both;* and on that foot I concur." The case of Castling *v.* Aubert, 2 East, 325, proceeded upon the same ground. There the plaintiff held certain policies of insurance, which he had effected, as an insurance broker, for the use of one Grayson, and upon the faith of which he had accepted bills for Grayson's accommodation. A loss having happened on the policies in question, and the defendant, who was

received, and for debts, with the payment of which the property is charged. (*d*)

It has been made a question whether the words "debt, default, or miscarriage," extend to a liability for a mere tort. But it is now well settled that they do. (*e*) And a *covenant* or promise under seal, is said not to be within the statute. (*f*)

Grayson's agent, wishing to obtain possession of the policies, in order to receive the amount of the loss from the underwriters, promised, in consideration, that the plaintiff would deliver to him the policies, to provide funds for the payment of the plaintiff's acceptances. The policies were accordingly delivered to the defendant, who received from the underwriters more than sufficient to cover the plaintiff's acceptances. Upon these facts, the court held the defendant liable. And *Le Blanc*, J., said: "This is a case where one man, having a fund in his hands which was adequate to the discharge of certain incumbrances, another party undertook that if that fund were delivered up to him, he would take it with the incumbrances; this, therefore, has no relation to the statute of frauds." It would seem that some of the judges held the defendant liable also upon his *special promise*, upon the other principle established by Williams *v.* Leper, namely, that the main purpose and object of the defendant in making the promise, was not to pay the debt of Grayson, but to subserve a purpose of his own, namely, to get possession of the policies. See *supra*. But if the facts are correctly reported, it would seem difficult to sustain the decision upon this ground. For it appears that the defendant was acting as Grayson's agent, and that he received the policies on Grayson's account, and for his benefit. The consideration of the promise, therefore, enured entirely to the benefit of Grayson; and the case, in this view, would seem to come within the decision in Nelson *v.* Boynton, 3 Met. 396, where it was *held*, that a promise to pay the note of a third person, which was in suit and secured by an attachment of his property, in consideration of the holder's discontinuing the suit, and relinquishing his attachment, was within the statute. It is to be observed, however, that some of the language attributed to Lord *Ellenborough*, would seem to indicate that the defendant's name was on bills accepted by the plaintiff, and tha his object, therefore, in undertaking to provide funds for their payment, was his own discharge. Thus, his lordship said that the defendant, in making the promise, "had not the discharge of Grayson principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of Grayson would eventually follow." If we may infer from this that the defendant was liable on the bills, the case is relieved from all difficulty. See *supra*, p. 24, n. (*t*). See in further illustration of the principle stated in the text, Edwards *v.* Kelly, 6 M. & S. 204 There, the plaintiff, for rent-arrear, having distrained goods which the tenant was about to sell, agreed with the defendants to deliver up the goods, and to permit them to be sold by one of the defendants for the tenant, upon the defendants' jointly undertaking to pay the plaintiff the rent due; and the goods were accordingly delivered to the defendants. *Held*, that the case was not within the statute. And Lord *Ellenborough* said: "Perhaps this case might be distinguished from that of Williams *v.* Leper, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession subject to this trust. So that in substance this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent." And see Bampton *v.* Paulin, 4 Bing. 264.

(*d*) See Thomas *v.* Williams, 10 B. & C. 664. See *ante*, vol. II. pp. 62, 63.

(*e*) The case of Read *v.* Nash, 1 Wilson, 305, for some time gave countenance to a contrary opinion. But the doctrine stated in the text was clearly established by Kirkham *v.* Marter, 2 B. & Ald. 613.

(*f*) Douglass *v.* Howland, 24 Wend. 35; Bush *v.* Stevens, id. 256; Barnum *v.* Childs, 1 Sandf. 58, 11 Barb. 14. And the words "value received" are also held to have this effect, in Edelen *v.* Gough, 5 Gill, 103.

The third clause in this section, which declares that "no action shall be brought upon any agreement made in consideration of marriage, unless," &c., is not generally adopted in this country. It has already been said, that promises to marry are not within the statute. (*g*) But all promises in the nature of settlement, advancement, or provision in view of marriage, are within the statute, and must be in writing. (*h*) And a promise to marry after a period longer than one year, has been held to be within the last clause of this section. (*i*)

A parol promise in a marriage settlement, although not itself enforceable by reason of the statute, has been held to be a sufficient consideration, either to sustain a settlement made after marriage in conformity with the promise, (*j*) or a new promise made in writing after marriage. (*k*) And where instructions are given and preparations made for marriage settlements, and the woman is persuaded by the man to marry, trusting to his verbal promise to complete them, it has been thought that equity ought to relieve and compel performance. (*l*)

There, one T. E. Marter had wrongfully and without the license of the plaintiff, ridden the plaintiff's horse, and thereby caused its death. *Held*, that a promise by the defendant to pay the damages thereby sustained, in consideration that the plaintiff would not bring any action against the said T. E. Marter, was within the statute of frauds, and must be in writing. And per *Abbott*, C. J., "The word 'miscarriage' has not the same meaning as the word 'debt,' or 'default; it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages; and therefore, in my judgment, falls within the meaning of the word miscarriage.'" *Holroyd*, J., "I think the term *miscarriage* is more properly applicable to a ground of action founded upon a tort, than to one founded upon a contract; for in the latter case the ground of action is, that the party has not performed what he agreed to perform; not that he has misconducted himself in some matter for which by law he is liable. And I think that both the words *miscarriage* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract." *Best*, J., "The question is, whether the words of the act are large enough to embrace this case. There is nothing to restrain these words, *default* or *miscarriage*; and it appears to me that each of them is large enough to comprehend this case. And see Turner *v.* Hubbell, 2 Day, 457.

(*g*) See *ante*, vol. II. pp. 62, 63. And see further, Clark *v.* Pendleton, 20 Conn. 495; Ogden *v.* Ogden, 1 Bland, 287.

(*h*) See *ante*, vol. II. p. 71.

(*i*) See *ante*, vol. II. p. 63.

(*j*) Wood *v.* Savage, Walk. Ch. 471. But see *ante*, vol. II. p. 71, n. (*v*).

(*k*) Mountacute *v.* Maxwell, 1 Stra. 236; De Beil *v.* Thomson, 3 Beav. 469, s. c. *nom.* Hammersley *v.* De Beil, 12 Clark & F. 45; Surcome *v.* Pinniger, 3 De G., M. & G. 571, 17 Eng. L. & Eq. 212.

(*l*) Per *Story*, J., in Jenkins *v.* Eldridge, 3 Story, 291. But see Montacute *v.* Maxwell, 1 P. Wms. 618. In this case the plaintiff brought a bill against the defendant, her husband, setting forth that the defendant, before her intermarriage with him, promised that she should enjoy all her own estate to her separate use; that he had agreed to execute writings to that

The principal questions which have arisen under this clause relate to the sufficiency of the written promise. It is enough if contained in a letter; (*m*) or in many letters, which may be read together as parts of a correspondence on one subject. (*n*) But it must be a promise to the other party; and therefore a letter from a father to his daughter, promising her an advancement, which is not shown to the intended husband, nor known to him until after marriage, is denied to be a promise to him within the meaning of the statute. (*o*) So if in such a letter the writer objects to, and endeavors to dissuade from the proposed marriage. (*p*) Whatever be its form, it must amount, substantially, to a promise made to the party, in consideration that he or she will marry a certain other party. (*q*)

purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him; but engaged, that upon his honor she should have the same advantage of the agreement as if it were in writing, drawn in form by counsel, and executed; whereupon the marriage took effect. To this bill the defendant pleaded the statute of frauds. And the Lord Chancellor said: "In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making these promises void, equity will not interfere; nor were the instructions given to counsel for preparing the writings material, since, after they were drawn and engrossed, the parties might refuse to execute them."

(*m*) Seagood *v.* Meale, Prec. in Ch. 560; Wankford *v.* Fortherly, 2 Vern. 322; Bird *v.* Blosse, 2 Vent. 361. In this last case a father wrote a letter signifying his assent to the marriage of his daughter with one J. S., and that he would give her 1,500*l.* Afterwards by another letter, upon a further treaty concerning the marriage, he went back from the proposals of his first letter. But subsequently to his writing the last letter, he declared that he would agree to what was proposed in his first letter. The court *held*, that the last declaration had set the terms in the first letter up again; and that the undertaking therefore was sufficiently evidenced by writing within the statute of frauds.

(*n*) See *ante*, p. 4, n. (*c*).

(*o*) Ayliffe *v.* Tracy, 2 P. Wms. 65.

(*p*) Douglas *v.* Vincent, 2 Vern. 202.

(*q*) See Randall *v.* Morgan, 12 Ves. 67; Ogden *v.* Ogden, 1 Bland, 284. In Maunsell *v.* White, 1 Jones & La T. 539, it appeared, that upon a treaty for a marriage between M. & E., a minor, M. communicated to the guardians of E. a letter from his uncle, H., stating that he had, by his will, left his T. estate to M. The guardians resolved, that until a suitable settlement should be made by H., of real estate, upon the marriage, in the usual course of settlement, it was not advisable that it should take place. This resolution was communicated to H., who in reply wrote to M.: "My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time; and I am confident that I shall never alter it to your disadvantage. I repeat that my T. estate will come to you at my death, unless some unforeseen occurrence should take place;" and desired his letter to be communicated to the guardians. The guardians thereupon consented to the marriage, which was solemnized. The court *held*, 1st, that the letter did not amount to a contract by H. to devise the T. estates to M., and that H. might dispose of them as

The fourth clause provides that "no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them," unless, &c. These words are very general, and obviously intended to have a wide operation; but they have been somewhat controlled by construction. Thus, if the question be, whether a contract for the sale of growing crops be a contract or sale of "any interest concerning lands," it seems to be answered in conformity with the intention of the parties. If grain be reaped, and stacked or stored in barns, it becomes certainly a chattel. And if it be growing when it is sold, yet if the sale contemplates its severance when grown, and a delivery of it then, distinct from the land, it is in the contemplation of the parties a mere chattel, and is therefore so in the view of the law, so far at least as this statute is concerned. (*r*) And we think it is the same with

he pleased by his will; 2d, that supposing it amounted to a contract, matters connected with the subsequent conduct of M. were "unforeseen occurrences;" and that H. was the sole person to determine whether, upon their happening, he would alter his will.

(*r*) This is the rule declared by the Supreme Judicial Court of Massachusetts, in Whitmarsh *v.* Walker, 1 Met. 313. That was an action founded on a parol agreement, whereby the defendant agreed to sell to the plaintiff two thousand mulberry trees at a stipulated price. The trees, at the time of the agreement, were growing in the close of the defendant. It was proved at the trial, that the plaintiff paid the defendant in hand the sum of ten dollars in part payment of the price thereof, and promised to pay the residue of the price on the delivery of the trees, which the defendant promised to deliver on demand; but which promise, on his part, he afterwards refused to perform. The defence was, that the contract was for the sale of an interest in land within the meaning of the statute of frauds. *Wilde*, J., said: "We do not consider the agreement set forth in the declaration, and proved at the trial, as a contract of sale consummated at the time of the agreement; for the delivery was postponed to a future time, and the defendant was not bound to complete the contract on his part, unless the plaintiff should be ready and willing to complete by the payment of the stipulated price. Sainsbury *v.* Matthews, 4 M. & W. 347. Independently of the statute of frauds, and considering the agreement as valid and binding, no property in the trees vested thereby in the plaintiff. The delivery of them and the payment of the price were to be simultaneous acts. The plaintiff cannot maintain an action for the non-delivery, without proving that he offered, and was ready to complete the payment of the price; nor could the defendant maintain an action for the price, without proving that he was ready and offered to deliver the trees. According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the statute of frauds. . . . . We think it therefore clear, that, giving to the contract the construction already stated, the plaintiff is entitled to recover. If, for a valuable consideration, the defendant contracted to sell the trees, to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it.

growing grass, or growing trees, or fruits; although some cases take a distinction in this respect, between what grows sponta-

and if he refused to comply with his agreement, he is responsible in damages." And the case of Nettleton *v.* Sikes, 8 Met. 34, is to the same effect. It was there *held*, that an agreement by an owner of land that another may cut down the trees on the land, and peel them, and take the bark to his own use, is not within the statute of frauds. And see Baker *v.* Jordan, 3 Ohio State, 438; Smith *v.* Bryan, 5 Md. 141. The same view has been taken in several English cases. Thus, in Smith *v.* Surman, 9 B. & C. 561, where the plaintiff, being the owner of trees growing on his land, verbally agreed with the defendant, while they were standing, to sell him the timber at so much per foot; *Littledale*, J., said: "I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the meaning of the fourth section. Those words in that section relate to contracts (for the sale of the fee-simple, or of some less interest than the fee), which give the vendee a right to the use of the land for a specific period. If, in this case, the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land, within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold." And *Parke*, J., dismissed this question with saying, "The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees till they were cut." Again, in Sainsbury *v.* Matthews, 4 M. & W. 343, where the defendant, in the month of June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2*s.* per sack, the plaintiff to have them at digging up time (October), and to find diggers, it was *held*, that this was not a contract for the sale of an interest in land, within the meaning of the statute of frauds. And *Parke*, B., said: "This is a contract for the sale of goods and chattels at a future day, the produce of certain land, and to be taken away at a certain time. It gives no right to the land; if a tempest had destroyed the crop in the mean time, and there had been none to deliver, the loss would clearly have fallen upon the defendant. It is only a contract for goods to be sold and delivered." And see Evans *v.* Roberts, 5 B. & C. 829. It must be admitted, however, that the English courts manifest a strong inclination, in the more recent cases, to hold a contract to be within the statute or not, according as the subject-matter of it consists of *fructus industriales*, or the spontaneous productions of the earth. See Scorell *v.* Boxall, 1 Young & J. 396; Evans *v.* Roberts, 5 B. & C. 829; Rodwell *v.* Phillips, 9 M. & W. 501; Jones *v.* Flint, 10 A. & E. 753. The same rule was very authoritatively declared in Ireland, in the case of Dunne *v.* Ferguson, Hayes, 540. That was an action of trover for five acres of turnips. It appeared that in October, 1830, the defendant sold to the plaintiff a crop of turnips which he had sown a short time previously. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use, and for which the present action was brought. No note in writing was made of the bargain. It was held that the plaintiff was entitled to recover. And *Joy*, C. B., said: "The general question for our decision is, whether, in this case, there has been a contract for an interest concerning lands, within the second [fourth] section of the statute of frauds; or whether it merely concerned goods and chattels; and that question resolved itself into another, whether or not a growing crop is goods and chattels. The decisions have been very contradictory, — a result which is always to be expected when the judges give themselves up to fine distinctions. In one case, it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case the distinction turned upon the hand that was to dig them; so that if dug by A. B., they were potatoes; and if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the

neously, and that which man has planted or sown and cultivated, holding, that only emblements, or what might be emblements, are to be considered as chattels, while the spontaneous growth of the land remains a part of it; at least, until it is fully ripe and ready for removal. (*s*) If, by the same contract, these things and the land on which they stand are sold, it is not a sale of land and chattels; for then they pass with the realty as a part of it, and the contract, in reference to them, is as much within this clause of the statute as it is in reference to the land itself. (*t*) Such are the views expressed, as we think, by the highest authorities, and supported by the best reasons. But there is some uncertainty and conflict on the subject. And, perhaps, it may be stated as a general rule, that, if the parties appear to consider the land merely as a place of deposit or storing for the vegetable productions, or as a means by which for a time they may be improved, they are so far disconnected from it, that they may be sold as chattels, and are not within the statute. And it is only when the parties connect the land and its growth together, either by express words or by the nature of

cases in obscurity. Another criterion must, therefore, be had recourse to; and fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be *goods;* and they were subject to all the legal consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them; and provides for lands and goods, according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop had been held to be an interest in lands, it would come within the second [fourth] section of the act; but if it were only goods and chattels, then it came within the thirteenth [seventeenth] section. On this, the only rational ground, the cases of Evans *v.* Roberts, 5 B. & C. 828; Smith *v.* Surman, 9 B. & C. 561; and Scorell *v.* Boxall, 1 Young & J., 396, have all been decided. And as we think that growing crops have all the consequences of chattels, and are, like them, liable to be taken in execution, we must rule the points saved for the plaintiff." Such also is the settled rule in New York. Green *v.* Armstrong, 1 Denio, 550; Bank of Lansingburg *v.* Crary, 1 Barb. 542; Warren *v.* Leland, 2 Barb. 613. For other cases upon the sale of growing crops, see Anonymous, 1 Ld. Raym. 182; Poulter *v.* Killingbeck, 1 B. & P. 397; Waddington *v.* Bristow, 2 B & P. 452; Crosby *v.* Wadsworth, 6 East, 602; Parker *v.* Staniland, 11 id. 362; Newcomb *v.* Ramer, 2 Johns. 421, n. (*a*); Austin *v.* Sawyer, 9 Cowen, 39; McIlvaine *v.* Harris, 20 Mo. 457; Warwick *v.* Bruce, 2 M. & S. 205; Emmerson *v.* Heelis, 2 Taunt. 38; Mayfield *v.* Wadsley, 3 B. & C. 357; Teal *v.* Auty, 2 Brod. & B. 99; Knowles *v.* Michel, 13 East, 249; Earl of Falmouth *v.* Thomas, 1 Cromp. & M. 89; Erskine *v.* Plummer, 7 Greenl. 447.

(*s*) See preceding note.

(*t*) Thayer *v.* Rock, 13 Wend. 53; Mayfield *v.* Wadsley, 3 B. & C. 357; Earl of Falmouth *v.* Thomas, 1 Cromp. & M. 89; Michelen *v.* Wallace, 7 A. & E. 49; Vaughan *v.* Hancock, 3 C. B. 766; Forquet *v.* Moore, 7 Exch. 870, 16 Eng. L. & Eq. 466. But this rule must be confined to cases where the contract for the land, and the crops standing upon it, is *entire*. See *ante*, p. 31, n. (*r*).

the contract, that the growth of the land comes within the statute. It seems to be settled, that a promise to pay for improvements on land, is only a promise to pay for work and labor, or materials, and not for an interest in lands, and therefore need not be in writing, (*u*) And a contract for the sale of removable fixtures is not within the statute. (*v*)

A mere license to use land, as to stack hay or grain upon it for a time, is not an interest in lands within the statute. (*w*) But that only is license in this respect, which, while it is an excuse for a trespass as long as it is not revoked, conveys no rights over the land, and subjects it to no servitude. For any contract, of which the effect is to give to one party an easement on the land of another, is within the statute. (*x*) But if a land lord agrees with a present lessee to make further improvements on the estate, for an additional compensation, this has been held to be an agreement collateral only to the land, and not within the statute. (*y*)

Generally, in this country, and in England, the stock of a corporation is personal property; (*z*) and this is so, even though the whole property of the corporation be real, and the whole of its business relate to the care of real estate; if it be the surplus profit alone that is divisible among the individual members. (*a*)

(*u*) Frear *v.* Hardenbergh, 5 Johns. 272; Benedict *v.* Beebee, 11 Johns. 145; Lower *v.* Winters, 7 Cowen, 263; Garrett *v.* Malone, 8 Rich. Law, 335. The plaintiff conveyed to defendant a tract of land, as containing one hundred and ten acres, at eight dollars per acre, and it was verbally agreed between them that the land should be surveyed, and if it turned out that it contained less than one hundred and ten acres, plaintiff should refund, and if it contained more, plaintiff should pay for all over one hundred and ten acres at the rate of eight dollars per acre. *Held*, that the agreement was not within the statute.

(*v*) Bostwick *v.* Leach, 3 Day, 476; Hallen *v.* Runder, 1 Cromp. M. & R. 266.

(*w*) Carrington *v.* Roots, 2 M. & W. 248; Riddle *v* Brown, 20 Ala. 412; Mumford *v.* Whitney, 15 Wend. 380; Whitmarsh *v.* Walker, 1 Met. 313; Woodward *v.* Seely, 11 Ill. 157; Stevens *v.* Stevens, 11 Met. 251; Houghtaling *v.* Houghtaling, 5 Barb. 379; Wolfe *v.* Frost, 4 Sandf. Ch. 72; Dubois *v.* Kelly, 10 Barb. 496. And see *ante*, vol. II. p. 511, n. (*h*). But in Bennett *v.* Scott, 18 Barb. 347, it is *held*, that a verbal agreement between A and B, whereby A is to cut the wood and brush upon the land of B, and heap the brush, for the wood; A being allowed until the ensuing winter to draw the wood away by sleighing, is within the statute of frauds, and void as an *agreement*, but it operates as a *license* to A to cut the wood, and seems sufficient to vest the title in A to the wood cut under it.

(*x*) Foot *v.* New Haven and Northampton Co. 23 Conn. 214; Smart *v.* Harding, C. B. 1855, 29 Eng. L. & Eq. 252. And see cases cited in preceding note.

(*y*) Hoby *v.* Roebuck, 7 Taunt. 157; Donellan *v.* Reed, 2 B. & Ad. 899.

(*z*) Bligh *v.* Brent, 2 Young & C. 268; Tippets *v.* Walker, 4 Mass. 595. But see *contra*, Welles *v.* Cowles, 2 Conn. 567.

(*a*) Bligh *v.* Brent, 2 Young & C. 268; Watson *v.* Spratley, 10 Exch. 222, 28 Eng. L. & Eq. 507.

But where lands are vested, not in the corporation, but in the individual shareholders, and the corporation has only the power of management, in that case the stock or shares are real property. (*b*) And it would follow, that a contract for the sale of this stock, or for these shares, is within the statute, as a contract for the sale of an interest in lands.

When a contract, originally within this clause of the statute, has been executed, and nothing remains to be done but payment of the consideration, this may be recovered notwithstanding the statute. (*c*) But in such case the declaration should be framed, not upon the original contract, but upon the contract implied by law from the plaintiff's performance. (*d*)

A contract to convey lands for certain services is within the statute; and if the services are rendered, the contract cannot be enforced, unless in writing. But a *quantum meruit* will lie for the services, and the value of the land may be considered by the jury, although it cannot be regarded as the fixed and determinate measure of the damages. (*e*)

The fifth clause of this section declares, that "no action shall be maintained upon any agreement that is not to be performed within the space of one year from the making thereof, unless," &c. Much the most important rule in reference to this section, we have had occasion to allude to already. (*f*) It may be stated thus. If the executory promise be capable of entire performance within one year, it is not within this clause of the statute. The decision of this question does not seem to depend entirely upon the understanding or intention of the parties. They may contemplate as probable a much longer continuance of the contract, or a suspension of it and a revival after a longer period; it may in itself be liable to such continuance and re-

(*b*) Id.

(*c*) Thus, if a verbal contract is made for the conveyance of land, and the land is conveyed accordingly, the statute of frauds furnishes no defence to an action brought to recover the price. Brackett *v.* Evans, 1 Cush. 79; Preble *v.* Baldwin, 6 id. 549; Linscott *v.* McIntire, 15 Me. 201; Thayer *v.* Viles 23 Vt. 494; Morgan *v.* Bitzenberger, 3 Gill, 350; Thomas *v.* Dickinson, 14 Barb. 90, 2 Kernan, 364; Gillespie *v.* Battle, 15 Ala. 276 And see Moore *v.* Ross, 11 N. H. 655; Holbrook *v.* Armstrong, 1 Fairf. 31; per *Tindall*, C. J., in Souch *v.* Strawbridge, 2 C. B. 808.

(*d*) Cocking *v.* Ward, 1 C. B. 858; Kelly *v.* Webster, 12 id. 283.

(*e*) Ham *v.* Goodrich, 37 N. H. 185.

(*f*) See *ante*, vol. II. p. 45, n. (*i*)

vival; and it may in this way be protracted so far that it is not in fact performed within a year; but if, when made, it was in reality capable of a full and *bona fide* performance within the year, without the intervention of extraordinary circumstances, then it is to be considered as not within the statute. (*g*)

(*g*) The cases which have arisen upon this clause of the statute may be conveniently arranged in three classes. 1. Where, *by the express agreement of the parties*, the performance of the contract is not to be completed within one year. 2. Where it is evident, *from the subject-matter of the contract*, that the parties had in contemplation a longer period than one year as the time for its performance. 3. Where the time for the performance of the contract is made to depend upon some contingency, which may or may not happen within one year. Cases falling within the first class are clearly within the statute. Thus, in Bracegirdle *v.* Heald, 1 B. & Ald. 722, it was held, that a contract made on the 27th of May, for a year's service, to commence on the 30th of June following, was within the statute. So, where A, on the 20th of July, made proposals to B to enter his service as bailiff for a year, and B took the proposal and went away, and entered into A's service on the 24th of July, it was held, that this was a contract on the 20th, and so not to be performed within the space of one year from the making, and within the 4th section of the statute of frauds. Snelling *v.* Lord Huntingfield, 1 Cromp., M. & R. 20. And, in Birch *v.* The Earl of Liverpool, 9 B. & C. 392, it held, that a contract whereby a coachmaker agreed to let a carriage for a term of 5 years, in consideration of receiving an annual payment for the use of it, was within the statute. And see Lower *v.* Winters, 7 Cowen, 263; Derby *v.* Phelps, 2 N. H. 515; Hinckley *v.* Southgate, 11 Vt. 428; Squire *v.* Whipple, 1 id. 69; Foote *v.* Emerson, 10 id. 338; Pitcher *v.* Wilson, 5 Mo. 46; Drummond *v.* Burrell, 13 Wend. 307; Shute *v.* Dorr, 5 id. 204; Lockwood *v.* Barnes, 3 Hill, 130; Hill *v.* Hooper, 1 Gray, 131; Sweet *v.* Lee, 4 Scott, N. R. 77; Giraud *v.* Richmond, 2 C. B. 835; Lapham *v.* Whipple, 8 Met. 59; Tuttle *v.* Swett, 31 Me. 555; Wilson *v.* Martin, 1 Denio, 602; Pitkin *v.* The Long Island R. R. Company, 2 Barb. Ch. 221. And such a contract will not be taken out of the statute by the mere fact that it may be put an end to within a year by one of the parties, or a third person. Thus, in Harris *v.* Porter, 2 Harring. (Del.), 27, where the defendant, a mail-contractor, made a sub-contract with the plaintiff to carry the mail for more than a year, it was contended that the contract was not within the statute, because the contract between the defendant and the postmaster-general reserved to the latter the power to alter the route, and thus put an end to the contract at any time; it might, therefore, be terminated within a year, and did not necessarily reach beyond it. But the court said, "This was a contract which could not possibly be *performed* within one year; by its terms it was to continue *four* years. And though it might be annulled or put an end to by the postmaster-general within the year, it still falls within the act as an agreement which, according to its terms, is not to be performed within the space of one year." Birch *v.* The Earl of Liverpool, 9 B. & C. 392, is to the same effect. But if it is merely optional with one of the parties whether he shall perform the contract within a year or take a longer time, the contract is not within the statute. Therefore, it has been held, that an agreement that one party may cut certain trees on the land of the other, at any time within ten years, is not within the statute. Kent *v.* Kent, 18 Pick. 569. So, where the plaintiff and defendant entered into a contract by which the plaintiff agreed to labor for the defendant for one year, but without fixing any definite time for the labor to commence, it was held that the contract was not within the statute, for the plaintiff had a right to commence immediately. Russell *v.* Slade, 12 Conn. 455. And see Linscott *v.* McIntire, 15 Me. 201; Plimpton *v.* Curtiss, 15 Wend. 336. In regard to the second class of cases, namely, those where it is evident, *from the subject-matter of the contract*, that the parties had in contemplation a longer period than one year as the time for its performance, although there is no express agreement to that effect, there has been more doubt, but it is now settled that they are within the statute. The leading

The same observation may be made in respect to the clause of which we are now treating, that we have already had occasion

case of this class is Boydell *v.* Drummond, 11 East, 142. In this case the plaintiff had proposed to publish by subscription a series of large prints from some of the scenes in *Shakspeare's* plays, after pictures to be painted for that purpose, under the following conditions, among others, namely, that seventy-two scenes were to be painted, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints; and that one number at least should be *annually* published after the delivery of the first. The defendant became a subscriber. And the court *held*, that the contract was within the statute. The same point is well illustrated by the case of Herrin *v.* Butters, 20 Me. 119. For the facts of that case, see *ante*, vol. II. p. 45, n. (*i*). *Whitman*, C. J., in delivering the opinion of the court, said: "It is urged, that the defendant might have cleared up the land, and seeded it down in one year, and thereby have performed his contract. This may have been within the range of possibility; but whether so or not must depend upon a number of facts, of which the court are uninformed. This, however, is not a legitimate inquiry under this contract. We are not to inquire what, by possibility, the defendant might have done, by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do; and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant. But the contract is an entirety, and all parts of it must be taken into view together, in order to a perfect understanding of its extent and meaning. We must not only look at what the defendant had undertaken to do, but also to the consideration inducing him to enter into the agreement. The one is as necessary a part of the contract as the other; and if either, in a contract wholly executory, were not to be performed in one year, it would be within the statute of frauds. Here the defendant was not to avail himself of the consideration for his engagement, except by a receipt of the annual profits of the land, as they might accrue, for the term of three years. But whether this be so or not, it is impossible to doubt that the parties to this contract perfectly well understood and contemplated, that it was to extend into the third year for its performance, both on the part of the plaintiff and defendant. Its terms most clearly indicate as much; and by them it must be interpreted." In the case of Moore *v.* Fox, 10 Johns. 244, the court say, to bring the case within the statute, it must appear to be an *express* and *specific* agreement that the contract is not to be performed within one year, and cite the case of Fenton *v.* Emblers, 3 Burr. 1278, where the same language is used by the court. But in the case of Boydell *v.* Drummond, 11 East, 142, in which there was no express and specific agreement, that the contract should not be performed within a year, the court say, that the whole scope of the undertaking shows that it was not to be performed within a year, and was therefore within the statute. This seems to show, very clearly, what is to be understood by an *express* or *specific* agreement, that a contract is not to be performed within a year. In the case of Peters *v.* Westborough, 19 Pick. 364, Mr. Justice *Wilde*, in delivering the opinion of the court, says, "it must have been expressly stipulated by the parties, *or it must appear to have been so understood by them*, that the agreement was not to be performed within a year. But who can doubt what the express and specific understanding of the parties in the case at bar was? and that it was not to be performed within one year? Or at any rate, that it appears to have been so understood by them." In regard to the third class of cases, namely, where the time for the performance of the contract is made to depend upon some contingency, which may or may not happen within a year, it is settled that they do not come within the statute. This was decided against the opinion of *Holt*, C. J., in the case of Peter *v.* Compton, Skin. 353. There the defendant promised for one guinea to give the plaintiff so many guineas on the day of his marriage. And it was *held*, that the plaintiff was entitled to recover although the agreement was not in writing. So, in Fenton *v.* Emblers, 3 Burr. 1278, where the defendant's testator undertook, by his last will and testament, to bequeath the plaintiff a legacy, it was *held*, that the undertaking was not within the statute, because the time for its

to make of other clauses in the fourth section, namely, that when a contract, originally within its provisions, has been entirely executed on one side, and nothing remains of the payment of the consideration, this may be recovered, notwithstanding the statute. (*h*) But whether a recovery can be had on the

performance depended upon the life of the testator, which might be terminated within a year. Again, in Wells *v.* Horton, 4 Bing. 40, where A being indebted to the plaintiff, promised him that in consideration of his forbearing to sue, A's executor should pay him £10,000; it was *held*, that this was not a promise required by the statute of frauds to be in writing. And this doctrine has been carried so far as to include a case where one undertakes to abstain from doing a certain thing, without limitation as to time, on the ground that such a contract is in its nature binding only during the life of the party. Thus, in Lyon *v.* King, 11 Met. 411, the defendant, for a good consideration, promised the plaintiff that he would not thereafter engage in the staging or the livery-stable business in Southbridge. And the court *held*, that the contract was not within the statute. *Dewey*, J., said: "The contract might have been wholly performed within a year. It was a personal engagement to forbear doing certain acts. It stipulated nothing beyond the defendant's life. It imposed no duties upon his legal representatives, as might have been the case under a contract to perform certain positive duties. The mere fact of abstaining from pursuing the staging and livery-stable business, and the happening of his death, during the year, would be a full performance of this contract. Any stipulations in the contract, looking beyond the year, depended entirely upon the contingency of the defendant's life; and this being so, the case falls within the class of cases in which it has been held that the statute does not apply." So, in Foster *v.* McO'Blenis, 18 Mo. 88, it was held, that a verbal agreement not thereafter to run carriages on a particular route, was not within the statute. But see Roberts *v.* Tucker, 3 Exch. 632; Holloway *v.* Hampton, 4 B. Mon. 415. For other cases depending upon a contingency, see Gilbert *v.* Sykes, 16 East, 150; Souch *v.* Strawbridge, 2 C. B. 808; Dobson *v.* Collis, 1 H. & N. 81; M'Lees *v.* Hale, 10 Wend. 426; Blake *v.* Cole, 22 Pick. 97; Peters *v.* Westborough, 19 Pick. 364; Roberts *v.* The Rockbottom Co. 7 Met. 46; Ellicott *v.* Peterson, 4 Md. 476; Clark *v.* Pendleton, 20 Conn. 495; Howard *v.* Burgen, 4 Dana, 137; Sherman *v.* Champlain Trans. Co. 31 Vt. 162. In the case of Tolley *v.* Greene, 2 Sandf. Ch. 91, the Assistant Vice-Chancellor intimated an opinion, that a contract which cannot be performed within a year, except upon a contingency which neither party, nor both together, can hasten or retard, such as the death of one of them or of a third person, is not within the statute. But we are not aware that such a distinction finds any support in the decided cases.

(*h*) This point was adjudged in Donellan *v.* Read, 3 B. & Ad. 899. In that case a landlord who had demised premises for a term of years, at £50 a year, agreed with his tenant to lay out £50 in making certain improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work. And it was held, that this was not within the statute of frauds, as an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord. During the argument, *Parke*, J., interrupted the counsel to say: "If goods are sold, to be delivered immediately, or work contracted for, to be done in less than a year, but to be paid for in fourteen months, or by more than four quarterly instalments, is that a case within the statute? In Bracegirdle *v.* Heald, 1 B. & Ald. 722, *Abbott*, J., takes the distinction, that in the case of an agreement for goods to be delivered by one party in six months, and to be paid for in eighteen, all that is to be performed on one side is to be done within a year; which was not so in the case then before the court." And *Littledale*, J., in delivering the judgment of the court, said, "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded

original contract, or only on a *quantum meruit*, is not entirely clear upon the authorities. (*i*) Upon principle, however, we should say that a recovery in such case can be had only upon a *quantum meruit*. (*j*)

We now pass to the seventeenth section. Let us first inquire what satisfies the condition, that the buyer shall accept and actually receive a part of the goods. Some confusion has arisen on this subject, from a want of discrimination between a sale at common law, a sale as effected by the statute of Elizabeth, of fraudulent conveyances, and the statute of Charles, of frauds and perjuries. At common law, if the seller makes a proposition and the buyer accepts, and the goods are in the immediate control and possession of the seller, and nothing remains to be done to identify them, or in any way prepare them for delivery, the sale is complete, and the property in the goods passes at once and perfectly; the buyer acquires not a mere *jus ad rem*, but an absolute *jus in re;* and he may demand delivery at once, on tender of the price, and sue for the goods as his own if delivery be refused; the seller having no right of property, but a mere right of possession, by way of lien on the goods for his price. (*k*) Then came the statute of Elizabeth, which, aided by construction, made the want of delivery, or of transfer of possession, evidence, more or less conclusive, of fraud, which vitiated the sale. Here, then, grew up many questions as to what constituted delivery, and what was its effect; and we have seen that a great diversity and conflict of adjudication has existed upon these questions. (*l*) But after the statute of Elizabeth came the statute of Charles, of frauds and perjuries; and this in express terms requires, *in order to*

on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full, till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part." For other cases illustrating this point, see Cherry *v.* Hening, 4 Exch. 631; Souch *v.* Strawbridge, 2 C. B 808; Mavor *v.* Pyne, 3 Bing. 285; Lockwood *v.* Barnes, 3 Hill, 128; Broadwell *v.* Getman, 2 Denio, 87; Holbrook *v.* Armstrong, 1 Fairf. 31; Compton *v.* Martin, 5 Rich. 14; Bates *v.* Moore, 2 Bailey, 614; Johnson *v.* Watson, 1 Ga. 348; Rake *v.* Pope, 7 Ala. 161; Blanton *v.* Knox, 3 Mo. 342; Talmadge *v.* The Rensselaer & Saratoga R. R. Co. 13 Barb. 493; Stone *v.* Dennison, 13 Pick. 1.

(*i*) See cases cited in preceding note.

(*j*) And see *ante*, p. 35, n. (*d*).

(*k*) See *ante*, vol. 1, pp. 526, 527.

(*l*) See *ante*, vol. 1, pp. 527, 528.

sustain an action, both delivery and acceptance; and the questions which spring up under this statute must be considered as entirely distinct from the former questions. To illustrate this in the simplest form, let us suppose that A orally orders B to send him one hundred bales of cotton, of a certain quality and price; B sends the goods as directed; and here no question can exist, under the statute of Elizabeth, in respect to the possession, because that has been transferred by the delivery; but the case is still open to any inquiry as to fraud. At common law, A may say that the cotton is not of the kind or quality that he ordered, and if he can establish this, he has the right of sending it back and refusing to pay for it; if he cannot, the transaction is completed; the seller cannot reclaim the cotton, nor the buyer refuse the price. But by the statute of frauds, the buyer may at once send the cotton back, and refuse payment for it, although precisely what he ordered, and no action can be brought against him for the price. Because, by this statute both delivery and acceptance are requisite; and the delivery is to be made by one party, and the acceptance by another; and the consequence of this is, that while the seller is bound by his delivery, and cannot reclaim the goods, the buyer has his option to keep the goods and pay for them, or return them and not pay. The statute in fact *postpones* the completion of an oral contract of sale. At common law, it is finished when one makes the offer of sale and the other accepts. By the statute, nothing is done by this offer and acceptance; another step must be taken; the goods themselves must be offered and accepted, and then only is the sale completed. It should seem, perhaps, that the same reason would give the seller, after delivery of the goods, and before acceptance of them, the same right to withdraw his goods, that he has to withdraw his offer before an acceptance of it; but we are not aware of any authority to this effect.

If the sale be complete, and the bargain is for immediate delivery; and the seller asks the buyer to lend him the chattel for a time, to which the buyer assents and therefore does not at once take it away, but permits the seller (the plaintiff) to keep

it, this has been recently held in England to be an acceptance under the statute. (*m*)

In regard to what constitutes a delivery under the statute, and what constitutes an acceptance, there have been many decisions which it is difficult to reconcile. But the question is often one of fact rather than of law. Indeed it is always a question of fact for the jury, whether the goods were delivered and accepted; but it is a question on which they will be directed by the court; and thus the question becomes a mixed one, of fact and law.

It may be said, in general, that a delivery must be a transfer of possession and control, made by the seller, with the purpose and effect of putting the goods out of his hands. (*n*) This is a

(*m*) Marvin *v.* Wallis, 6 Ellis & B. 726. See also, as to acceptance, Taylor *v.* Wakefield, id. 765.

(*n*) Phillips *v.* Bistolli, 2 B. & C. 511; Dole *v.* Stimpson, 21 Pick. 384; Tempest *v.* Fitzgerald, 3 B. & Ald. 680; Parker *v.* Wallis, 5 Ellis & B. 21; Holmes *v.* Hoskins, 9 Exch. 753. In the earlier cases, slight acts were considered as sufficiently evidencing the actual receipt of the property by the purchaser. Chaplin *v.* Rogers, 1 East, 192; Hodgson *v.* Le Bret, 1 Camp. 233; Anderson *v.* Scott, 1 Camp. 235, n.; Elmore *v.* Stone, 1 Taunt. 458; Blenkinsop *v.* Clayton, 7 Taunt. 597; Vincent *v.* Germond, 11 Johns. 283. But the later cases are much more strict. See Howe *v.* Palmer, 3 B. & Ald. 321; Tempest *v.* Fitzgerald, id. 680; Maberley *v.* Sheppard, 10 Bing. 99; Carter *v.* Toussaint, 5 B. & Ald. 855; Baldey *v.* Parker, 2 B. & C. 37; Holmes *v.* Hoskins, 9 Exch. 753, 28 Eng. L. & Eq. 564; Cunningham *v.* Ashbrook, 20 Mo. 553. "To constitute delivery," in the language of *Parke*, B., in Bill *v.* Bament, 9 M. & W. 41, "the possession must have been parted with by the owner, so as to deprive him of the right of lien." But see Dodsley *v.* Varley, 12 A. & E. 632. The question, what constitutes a sufficient delivery to satisfy the statute, was much discussed in New York, in the recent case of Shindler *v.* Houston, 1 Denio, 48, 1 Comst. 261. In that case the plaintiff and defendant bargained respecting the sale by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock, and in the view of the parties at the time of the bargain, and which had been before that time measured and inspected. The defendant offered a certain price per foot, which being satisfactory to the plaintiff, he said, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of the lumber, and take it to one House, who was the defendant's agent, and who, he said, would pay the amount. This was soon after done, but payment was refused. The price being over fifty dollars, and the statute of frauds being relied on, it was *held*, by the Supreme Court, in an action for the price of the lumber, upon a declaration for lumber sold and delivered, that the court below was right in refusing to charge the jury that the property did not pass at the time of the bargain; and that the facts were properly submitted to the jury, with instructions that they might find an absolute delivery and acceptance of the lumber at the time of the bargain, and that the payment was postponed, and credit given therefor, until the inspector's bill should be presented to House. But upon appeal to the Court of Appeals, the judgment of the Supreme Court was reversed. And *Wright*, J., in delivering his opinion in the latter court, said, "It is to be regretted that the plain meaning of the statute should ever have been departed from, and that any thing short of an actual delivery and acceptance should have been regarded as satisfying its requirements, when the memorandum was omitted; but another rule of interpretation, which admits of a constructive or symbolical delivery, has become too firmly

sufficient delivery, whatever be its form; and upon a sale of personal property, any acts of the parties indicative of the exer-

established now to be shaken. The uniform doctrine of the cases, however, has been that in order to satisfy the statute there must be something more than mere words — that the act of *accepting* and *receiving* required to dispense with a note in writing, implies more than a simple act of the mind, unless the decision in Elmore *v.* Stone, 1 Taunt. 458, is an exception. This case, however, will be found upon examination to be in accordance with other cases, although the acts and circumstances relied on to show a delivery and acceptance were extremely slight and equivocal; and hence the case was doubted in Howe *v.* Palmer, 3 B. & Ald. 324, and Proctor *v.* Jones, 2 C. & P. 534, and has been virtually overruled by subsequent decisions. Far as the doctrine of constructive delivery has been sometime carried, I have been unable to find any case that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the *precise form of words* to show a delivery and receipt of the goods. The learned author of the Commentaries on American Law, cites from the Pandects the doctrine, that the consent of the party upon the spot is a sufficient possession of a column of granite, which, by its weight and magnitude, was not susceptible of any other delivery. But so far as this citation may be in opposition to the general current of decisions, in the common-law courts of England and of this country, it is sufficient perhaps to observe, that the Roman law has nothing in it analogous to our statute of frauds. In Elmore *v.* Stone, expense was incurred by direction of the buyer, and the vendor, at his suggestion, removed the horses out of the sale stable into another, and kept them at livery for him. In Chaplin *v.* Rogers, 1 East, 192, to which we were referred on the argument, the buyer sold part of the hay, which the purchaser had taken away; thus dealing with it as if it were in his actual possession. In the case of Jewett *v.* Warren, 12 Mass. 300, to which we were also referred, no question of delivery under the statute of frauds arose. The sale was not an absolute one, but a pledge of the property. The cases of Elmore *v.* Stone, and Chaplin *v.* Rogers, are the most barren of acts indicating delivery, but these are not authority — for the doctrine that words, *unaccompanied by acts* of the parties, are sufficient to satisfy the statute. Indeed, if any case could be shown which proceeds to that extent, and this court should be inclined to follow it, for all beneficial purposes, the law might as well be stricken from our statute-book; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the legislature aimed to repudiate. So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with, the statute is not satisfied with any thing but unequivocal acts of the parties; not mere words, that are liable to be misunderstood, and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best considered cases hold, that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal, that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold. But will proof of words alone show a delivery and acceptance from which consequences like these may be reasonably inferred? Especially, if those words relate not to the question of delivery and acceptance, but to the contract itself? A and B verbally contract for the sale of chattels, for ready money; and without the payment of any part thereof, A says, 'I deliver the property to you,' or 'It is yours,' but there are no acts showing a change of possession, or from which the facts may be inferred. B refuses payment. Is the right of the vendor, to retain possession as a lien for the price, gone? Or, in the event of a subsequent discovery of a defect in the quantum or quality of the goods, has B, in the absence of all acts on his part showing an ultimate acceptance of the possession, concluded himself from taking any objection? I think not. As Justice *Cowen* remarks, in the case of Archer *v.* Zeh, 5 Hill, 205, 'One object of the stat-

cise of ownership by the vendee, may be submitted to the jury as evidence of receipt and acceptance, to take the case out of the statute. (*o*) Hence delivery may be constructive; as by the delivery of the key of a warehouse, (*p*) or making an entry in the books of the warehouse keeper, (*q*) or delivery, with indorsement, of a bill of lading, (*r*) or even of a receipt. (*s*) But a mere delivery by the seller, and acceptance by the buyer of the seller's order on a bailee, does not seem to satisfy the statute, without some act of possession and acceptance of the property by the buyer, or the assent of the bailee to hold it for the buyer. (*t*) Even less than this may be a delivery and acceptance, where the goods are bulky and difficult of access or removal, as a quantity of timber floating in a boom, or a mass of granite, or a large stack of hay. (*u*) So a part may be deliv-

ute was to prevent perjury. The method taken was to have something done; not to rest every thing on mere oral agreement.' The acts of the parties must be of such a character as unequivocally to place the property within the power, and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit." And see Atwell *v.* Mayhew, 6 Md. 10; Denny *v.* Williams, 5 Allen, 1.

(*o*) Gray *v.* Davis, 10 N. Y. (6 Seld.), 285.

(*p*) Wilkes *v.* Ferris, 5 Johns. 335; Chappel *v.* Marvin, 2 Aikens, 79.

(*q*) Harman *v.* Anderson, 2 Camp. 243.

(*r*) Peters *v.* Ballistier, 3 Pick. 495. See next note.

(*s*) Wilkes *v.* Ferris, 5 Johns. 335. And see Searle *v.* Keeves, 2 Esp. 598; Harman *v.* Anderson, 2 Camp. 243; Withers *v.* Lyss, 4 id. 237; Tucker *v.* Ruston, 2 C. & P. 86.

(*t*) In Farina *v.* Hone, 16 M. & W. 119, goods were shipped by the plaintiff from abroad to this country, on the verbal order of the defendant, at a price exceeding £10. They were sent to a shipping agent of the plaintiff, in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent and charges. The agent indorsed and delivered this warrant to the defendant, who kept it for several months, and notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods; and that they would remain for the present in bond: — *Held*, that there was no such delivery to, and acceptance by the defendant of the goods, as to satisfy the 17th section of the statute of frauds. And *Parke*, B., said: "This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignee (who is the vendor's agent), and his possession is that of the consignee, until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the mean time the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee." And see Bentall *v.* Burn, 3 B. & C. 423; Godts *v.* Rose, 17 C. B. 229, 33 Eng. L. & Eq. 268; Lackington *v.* Atherton, 7 Man. & G. 360. Symbolical delivery is only effectual where it can be followed by an *actual* delivery. Stevens *v.* Stewart, 3 Cal. 140.

(*u*) Jewett *v.* Warren, 12 Mass. 300.

ered for the whole, and in general a delivery of part is a delivery of the whole, if it be an integral part of one whole, (*v*) but not if many things are sold and bought as distinct articles, and some of them are delivered and some are not. (*w*) If several owners make a joint sale, and one of them sells a part of his portion, the delivery of this is said to satisfy the statute as to all. (*x*) Whether the delivery of a part was intended as a delivery of the whole, is a question of fact for the jury. (*y*)

A sale by sample is not a sale with delivery, if the sample be first sent and afterwards the sale completed. But after a sale is made, a part of the goods may be delivered nominally as a sample, but yet so as to make it a part delivery and acceptance. (*z*) We think that if the seller does in any case, what is usual, or what the nature of the case makes convenient and proper, to pass the effectual control of the goods from himself and to the buyer, this is always a delivery; and nothing less than this is so.

In like manner as to the question of acceptance, we must inquire into the intention of the buyer, the nature of the goods, and the circumstances of the case. If the buyer intends to retain possession of the goods, and manifests this intention by a suitable act, it is an actual acceptance of them; (*a*) although this intention may be manifested by a great variety of acts, in accordance with the varying circumstances of different cases. He has a right to examine the goods, and ascertain their quality, before he determines whether to accept or not; and a retention by him for a time sufficient for this examination, and no more, is not an acceptance. (*b*)

Boynton *v.* Veazie, 24 Me. 286; Gibson *v.* Stevens, 8 How. 384; Calkins *v.* Lockwood, 17 Conn. 154. But see Shindler *v.* Houston, 1 Denio, 48, 1 Comst. 261.

(*v*) Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 4 B. & P. 69; Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* The Eastern Counties Railway Co. 12 M. & W. 33; Biggs *v.* Whisking, 14 C. B. 195, 25 Eng. L. & Eq. 257; Mills *v.* Hunt, 20 Wend. 431; Davis *v.* Moore, 13 Me. 424.

(*w*) Price *v.* Lea, 1 B. & C. 156; Seymour *v.* Davis, 2 Sandf. 239.

(*x*) Fi ld *v.* Runk, 2 N. J. 525.

(*y*) Pratt *v.* Chase, 40 Me. 269.

(*z*) In other words, the delivery of a sample, which is no part of the thing sold will not take a sale out of the statute, bu if the sample be delivered as part of the bulk, it then binds the contract. Talver *v.* West, Holt, N. P. 178; Johnson *v.* Smith, Anthon, N. P. 60; id. 81, 2d ed.; Hinde *v.* Whitehouse, 7 East, 558; Gardner *v.* Grout, 2 C. B. N. S. 340.

(*a*) Baines *v.* Jevons, 7 C. & P. 288; Saunders *v.* Topp, 4 Exch. 390.

(*b*) Percival *v.* Blake, 2 C. & P. 514; Kent *v.* Huskinson, 3 B. & P. 233; Phillips *v.* Bistolli, 2 B. & C. 511.

It is a question perhaps of some difficulty, how far such intention on the part of the buyer, and a corresponding act, are consistent with his reserving the right of making any future objection to the goods, on the score of quantity or quality, and rescinding the sale on such ground. The greater number of decisions declare such reservation to be incompatible with acceptance and actual receipt, and hold, therefore, that while the buyer retains this right, he has not accepted the goods under the statute. (*c*) But a recent decision of much weight, insists upon what seems to be the opposite doctrine. (*d*) We think,

(*c*) Per *Parke*, J., in Smith *v.* Surman, 9 B. & C. 561, 577; Norman *v.* Phillips, 14 M. & W. 277; Howe *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 557; Acebal *v.* Levy, 10 Bing. 376; Cunliffe *v.* Harrison, 6 Exch. 903; Curtis *v.* Pugh, 10 Q. B. 111; Outwater *v.* Dodge, 6 Wend. 397.

(*d*) Morton *v.* Tibbett, 15 Q. B. 428. This was an action brought to recover the price of fifty quarters of wheat. It appeared that on the 25th of August, 1848, the plaintiff and defendant being at March market, the plaintiff sold the wheat to the defendant by sample. The defendant said that he would send one Edgley, a general carrier and lighterman, on the following morning, to receive the residue of the wheat in a lighter, for the purpose of conveying it by water, from March, where it then was, to Wisbeach; and the defendant himself took the sample away with him. On the 26th August, Edgley received the wheat accordingly. On the same day the defendant sold the wheat, at a profit, by the same sample, to one Hampson, at Wisbeach market. The wheat arrived at Wisbeach, in due course, on the evening of Monday, the 28th August, and was tendered by Edgley to Hampson on the following morning, when he refused to take it, on the ground that it did not correspond with the sample. Up to this time the defendant had not seen the wheat; nor had any one examined it on his behalf. Notice of Hampson's repudiation of his contract was given to the defendant; and the defendant, on Wednesday, the 30th August, sent a letter to the plaintiff repudiating his contract with him on the same ground. There being no memorandum in writing of the contract, it was objected, for the defendant, that there was no evidence of acceptance and receipt, to satisfy the requirements of the statute of frauds. *Pollock*, C. B., before whom the case was tried, overruled the objection, and a verdict was found for the plaintiff. Afterwards, the case being brought before the Queen's Bench, on a motion to enter a nonsuit, pursuant to leave reserved at the trial, Lord *Campbell*, in delivering the judgment of the court, said: "In this case the question submitted to us is, whether there was any evidence on which the jury could be justified in finding that the buyer accepted the goods, and actually received the same so as to render him liable as buyer, although he did not give any thing in earnest to bind the bargain, or in part payment, and there was no note or memorandum in writing, of the bargain. It would be very difficult to reconcile the cases on this subject; and the difference between them may be accounted for by the exact words of the 17th section of the statute of frauds not having been always had in recollection. Judges, as well as counsel, have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods by the buyer, and, after that, an actual acceptance of the same. Hence, perhaps, has arisen the notion, that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. But the words of the act of parliament are; [here his lordship stated the whole of the 17th section.] It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the legislature appears to have been willing that this might be dispensed with, when by mutual consent there has been part performance. Hence, the payment of any

however, the seeming conflict comes from confounding two questions which are distinct. If the buyer accepts and actually

sum in earnest, to bind the bargain, or in part payment, is sufficient. This act on the part of the buyer, if acceded to on the part of the vendor, is sufficient. The same effect is given to the corresponding act by the vendor, of delivering part of the goods sold to the buyer, if the buyer shall accept such part, and actually receive the same. As part payment, however minute the same may be, is sufficient, so part delivery, however minute the portion may be, is sufficient. This shows conclusively that the condition imposed was not the complete fulfilment of the contract, to the satisfaction of the buyer. In truth, the effect of fulfilling the condition is merely to waive written evidence of the contract, and to allow the contract to be established by parol, as before the statute of frauds passed. The question may then arise, whether it has been performed, either on the one side or the other. The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined. As the act of parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer, at all events, to object to the quantity and quality of the residue, and, even where there is a sale by sample, that the residue offered does not correspond with the sample. We are therefore of opinion, that, whether or not a delivery of the goods sold, to a carrier or any agent of the buyer, is sufficient, still there may be an acceptance and receipt, within the meaning of the act, without the buyer having examined the goods, or done any thing to preclude him from contending that they do not correspond with the contract. The acceptance, to let in parol evidence of the contract, appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled. We are therefore of opinion, in this case, that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it." His lordship then proceeded to examine most of the cases cited in the preceding note, and arrived at the conclusion that they were not sufficiently strong to control the action of the court; and the rule for a nonsuit was accordingly discharged. Since the decision of this case, the case of Hunt *v.* Hecht, 8 Exch. 814, 20 Eng. L. & Eq. 524, has been decided in the Court of Exchequer. That was an action for goods sold and delivered. On the trial it appeared, that one of the defendants, who were partners, called on the plaintiff, a bone-merchant, for the purpose of buying bones. He there saw a heap containing a quantity of the kind he desired to buy, but intermixed with others which were unfit for manufacturing purposes. He ultimately agreed with the plaintiff to buy the heap, if the objectionable bones were taken out. It was arranged between them that the plaintiff should deliver the bones at Brewer's Quay, in sacks, marked in a particular way; and the defendant gave the plaintiff a shipping note, or order, directed to the wharfinger, requesting him to receive and ship the goods, when the plaintiff should send them. The plaintiff sent the bags accordingly, marked as requested. They were delivered at the wharf, and received by the wharfinger, on Wednesday, the 9th of February, but the defendants did not hear of their being sent until the following day, when the invoice was received. The defendants then examined the bones and wrote to the plaintiff complaining of their quality, and declining to accept them. Upon this evidence, *Martin*, B., before whom the case was tried, nonsuited the plaintiff. And the Court of Exchequer *held*, that the nonsuit was right. *Pollock*, C. B., said: "The goods were received by the person appointed by the defendants, but they were not at any time accepted. The defendants never saw them when they were in a state to be accepted, because they had not been separated. A man does not accept flour by looking at the wheat that is to be ground. The article must be in a condition to be accepted. There was no evidence of any acceptance of these bones, for the defendants never saw them after the separation had taken place." *Alderson*, B: "If a man buys a quantity out of a larger bulk, he does not buy it until it is separated from the rest; and there must be an acceptance after the separa-

receives the goods, with a knowledge of their deficiency in quality or quantity, and without objection, he waives all right of future objection on this ground. If he accepts the same goods in the same way, without a knowledge of a deficiency which gives him a right of objection, and subsequently acquires this knowledge, he cannot return the goods and defend against an action for the price, under the statute, because the whole requirement of the statute has been satisfied; but he may, at common law, whether the contract of sale were oral or written, on the ground that the seller did not send or deliver to him what he bought. If the buyer expressly declares that he reserves the right of examining and objecting, this, perhaps, should be regarded rather as a conditional acceptance, which becomes complete and actual only when the condition has been satisfied.

A question has been made whether a delivery by the vendor to a carrier, satisfies the statute. The general question of the effect of delivery to a carrier, has been considered in the chapter on the sale of personal property. (*e*) Here it is only necessary to remark, that the delivery to a common carrier has been held to be such passing of the property out of the possession and control of the seller, as satisfies the statute, although the carrier is, for some purposes, the agent of the seller, who retains his lien, or quasi lien, by his right to stop the goods in transitu. (*f*) We

tion. He must have an opportunity of refusing what the vendor may have selected. Here there was a delivery, but no acceptance." *Martin*, B.: "The question is whether the defendants accepted part of the goods sold, and actually received the same. The contract was for such bones in the heap as were ordinarily merchantable, and they were only bound to accept such merchantable bones. Directions were, no doubt, given to the wharfinger, to receive the bones, and in one sense they were received; but this was not an acceptance within the statute. There is no acceptance unless the purchaser has exercised his option, or has done something that has deprived him of his option. Morton *v.* Tibbett is a correct decision, because the purchaser had there dealt with the goods as his own, but much that is said in that case may be open to doubt. The decisions, in my opinion, show that the acceptance must be after the purchaser has exercised his option, or has done something to preclude himself from doing so."

(*e*) See *ante*, vol. 1, p. 533.

(*f*) Hart *v.* Sattley, 3 Camp. 528 This was an action to recover the price of a hogshead of gin. The plaintiffs were spirit merchants in London, who had been in the habit of supplying spirits to the defendant, a publican, near Dartmouth, in Devonshire. In these previous dealings, the course had been for the plaintiff to ship the goods on board a Dartmouth trader, in the river Thames, and the defendant had always received them. The hogshead of gin in question was verbally ordered by the defendant of the plaintiff's traveller, and was shipped in the same manner as the others had been. There was no evidence either that it had

think this open to much doubt; and certainly, though it may be a delivery, it is not yet an acceptance by the buyer. But if the buyer designates a person as his carrier (although this person's occupation may be that of a common carrier), and directs the seller to deliver the goods as the buyer's, to this person, then it might be held, that the delivery was made to the buyer through an agent, and an acceptance made by the buyer through an agent. (*g*) But whether a designation of the carrier, and an order to deliver, and a compliance on the part of the seller, be such as to have this effect, must depend upon the intentions and acts of the parties, and the circumstances of each case. (*h*)

been delivered to the defendant in Devonshire, or that he refused to accept it. On the trial, before *Chambre*, J., the statute of frauds being relied on in defence, the learned judge said: "I think, under the circumstances of this case, the defendant must be considered as having constituted the master of the ship his agent, to *accept and receive the goods*." His lordship would seem to have rested his opinion, in some degree, upon the previous course of dealing between the parties. But the case must be considered as overruled by subsequent decisions. Thus, in Hanson *v.* Armitage, 5 B. & Ald. 557, it appeared that the plaintiffs, merchants in London, had been in the habit of selling goods to the defendant, resident in the country, and of delivering them to a wharfinger in London, to be forwarded to the defendant by the first ship. In pursuance of a parol order from the defendant, goods were delivered to, and accepted by the wharfinger, to be forwarded in the usual manner. *Held*, that this not being an acceptance by the buyer, was not sufficient to take the case out of the statute. And in the recent case of Meredith *v.* Meigh, 2 Ellis & B. 364, the facts were, that goods were delivered by the vendor, in Cornwall, on board a ship not named by the purchaser, and a bill of lading was signed by the captain, making them deliverable to carriers at Liverpool, named by the purchaser, for the purpose of receiving and forwarding the goods to him, in Staffordshire. A copy of the bill of lading was sent to the carriers at Liverpool, and on the 25th of April the purchaser received notice of the shipment of the goods, and did not repudiate the contract before the 6th of May, when he received information from the vendor that the ship and the goods were lost before they reached Liverpool. In an action by the vendor for the price of the goods, it was *held*, that there was no evidence to go to the jury of an acceptance and actual receipt of the goods by the defendant, within the statute of frauds. And Lord Campbell said: "Considering that no ship was named by the vendee, the mere delivery of the goods on board the Marietta, and the signing the bill of lading by the captain, was not sufficient acceptance and receipt, within the statute. Hart *v.* Sattley, 3 Camp. 528, if it be supposed to lay down such law, must be considered to have been overturned by subsequent decisions, in which I concur." And *Crompton*, J., said: "The delivery of goods to a carrier for the purpose of being carried, or to a wharfinger to be forwarded to the vendee by the first ship, in the usual manner, is not evidence of an acceptance and receipt, within the statute of frauds." And see Acebal *v.* Levy, 10 Bing. 376.

(*g*) See Coats *v.* Chaplin, 3 Q. B. 483.

(*h*) In Bushel *v.* Wheeler, 15 Q. B. 442, n., the defendant, living at Hereford, ordered goods, at a price above 10*l.*, of the plaintiff, living at Bristol, and directed that they should be sent by The Hereford, sloop, to Hereford. They were sent accordingly; and a letter of advice was also sent to the defendant, with an invoice, stating the credit to be three months. On their arrival at Hereford, they were placed in the warehouse of the owner of the sloop, where the defendant saw them; and he then said to the warehouseman that he would not take them; but he made no communication to the plaintiff till the end of five months, when

It has been much doubted, whether a contract for the sale of stock or shares in a corporation or joint-stock company, was

he repudiated the goods. In an action for the price of the goods, the judge before whom the cause was tried, having instructed the jury that there was no acceptance and actual receipt sufficient to satisfy the statute of frauds, it was *held*, that this instruction was erroneous, and that he should have left them to find, upon these facts, whether or not there had been such acceptance and actual receipt. And Lord *Denman* said: "The general intention of the statute is, that there should be a writing; this, as well as the acception for the case of delivery and acceptance, has been construed literally. Still, it must be a question whether there has been an acceptance and actual receipt. It is not necessary that the purchaser himself should form a judgment on the article sent; he may depute another to do so; or he may rely upon the seller. The defendant here orders the goods to be sent by a particular vessel which he names, and he receives the invoice, which states a three months' credit. He allows the goods to remain till that credit is expired, giving no notice to the seller, though he did say to his own agent that he would not take them. Now, such a lapse of time, connected with the other circumstances, might show an acceptance; whether there was an acceptance or not, is a question of fact. I do not think that the mere taking by the carrier is a receipt by the vendee; but the jury here should have been allowed to exercise a judgment on the question whether there was an actual receipt." *Williams*, J.: "When it is once settled that manual occupation is not essential to an actual receipt, and it is not now contended that it is, it becomes a question whether there have been circumstances constituting an actual receipt. The larger the bulk, the more impracticable it is that there should be a manual receipt; something there must be in the nature of constructive receipt, as there is constructive delivery. It being then once established that there may be an actual receipt by acquiescence, wherever such a case is set up it becomes a question for the jury whether there is an actual receipt. And all the facts must be submitted to their consideration, for the determination of that question." *Coleridge*, J.: "I agree that the acceptance must be, in the words of one of the cases cited, 'strong and unequivocal.' Maberley *v.* Sheppard, 10 Bing. 101. But that is quite consistent with its being constructive. Therefore, in almost all cases, it is a question for the jury, whether particular instances of acting or forbearing to act, amount to acceptance and actual receipt. Here goods are ordered by the vendee to be sent by a particular carrier, and, in effect, to a particular warehouse; and that is done in a reasonable time. That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case, the vendee would have had the right to look at the goods, and to return them if they did not correspond to order. But here the vendee takes no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary. The question must go to the jury." But see this case commented on, in Norman *v.* Phillips, 14 M. & W. 277. In Snow *v.* Warner, 10 Met. 132, it was held, that goods are received and accepted by the purchaser, within the statute of frauds, when they are transported by the seller to the place of delivery appointed by the agent who contracted for them, and are there delivered to another agent of the purchaser, and are by him shipped to a port where the purchaser had given him general directions to ship goods of the same kind. And *Hubbard*, J., in that case, said: "The authorities cited by the defendant's council, and upon which he relies, go to establish the doctrine, that a constructive delivery to a wharfinger, or a shipmaster, or to other persons engaged in receiving the goods of others, will not be a compliance with the statute of frauds, to bind the party as having accepted the goods. There was also, apparently, a leaning in the mind of Lord Chief Justice *Abbott*, to the opinion that the terms of the statute must be literally complied with; that is, that there must be an acceptance of the goods by the purchaser himself. Hanson *v.* Armitage, 1 Dowl. & R. 131. We are fully of opinion that the acceptance must be proved by some clear and unequivocal act of the party to be charged. The statute, by its language, requires it, and the construction it has received gives full force to that language. But we cannot say that, to bind the purchaser, the acceptance can only be by him personally. The statute,

within the statute. The question is, are they "goods, wares, or merchandises?" and the English authorities deny this; (*i*) in some degree, on the ground of a supposed analogy with the bankrupt law, within which the purchasing of stock does not bring a person, unless the purchase was for the purpose of trading in it, as by brokers. But it has been decided, in this country, that a sale of stock in a manufacturing company is within the statute; (*j*) and on this authority, as well as on general

in terms, provides that an agent may bind his principal by a memorandum in writing. If, then, an agent can purchase, we think it clearly follows — there being no prohibitory clause — that an agent duly authorized may also receive property purchased, and thus bind the principal. It is in accordance with the rights and duties of principals and agents, in other cases, and for the furtherance of trade and commerce. In the present case, it was proved that the plaintiffs transported the barrels to Boston, and delivered them at the place where the purchaser's agent directed, and that the agent in Boston afterwards shipped them to the port at the South, where the defendant had given general directions to have his barrels sent; and we are of opinion, with the learned judge who tried the cause in the court below, that this was a sufficient acceptance of the goods, within the statute. There was a delivery by the vendors to an agent authorized to receive an acceptance by him, and a forwarding of them to the place appointed by the principal. These acts are direct and unequivocal, and constitute a transfer of the property from the seller to the purchaser, who, in consequence of it, is bound to pay the price of the purchase."

(*i*) Humble *v.* Mitchell, 11 A. & E. 205. The principle upon which the English cases proceed is thus explained by Sir L. *Shadwell*, in Duncuft *v.* Albrecht, 12 Simons, 189: "It is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares, and merchandises, which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares, and merchandises, within the meaning of the 17th section." So held in Vaupell *v.* Woodward, 2 Sandf. Ch. 143, 146, n. And see further, Pickering *v.* Appleby, Comyns, 354; Colt *v.* Nettervill, 2 P. Wms. 304; Knight *v.* Barber, 16 M. & W. 66; Heseltine *v.* Siggers, 1 Exch. 856.

(*j*) Tisdale *v.* Harris, 20 Pick. 9. In this case, *Shaw*, C. J., said: "Supposing this a new question, now for the first time calling for a construction of the statute, the court are of opinion that, as well by its terms as its general policy, stocks are fairly within its operation. The words 'goods,' and 'merchandise,' are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word 'merchandise,' also, including, in general, objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies. There are many cases indeed, in which it has been held, in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and hence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal and coercive, and tended to deprive a man in trade of all his property. But most joint-stock companies were founded on the hypothesis, at least, that most of the shareholders took shares as an investment, and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant, so as to subject himself to the highly coercive process of the bankrupt laws. These

principles, we should suppose, that the sale of any incorporated stock would be held within the operation of the statute. (*k*) Whether a sale of promissory note be within the statute is not certain upon the authorities. (*l*) Indeed, both as to this question, and that of the sale of shares in incorporated companies, our notes show that in different States different rules prevail.

The delivery required by the statute may be subsequent to the agreement of sale.(*m*)

We will next inquire, what giving in earnest, or in part payment, satisfies the requirement of the statute. The statute borrows "earnest" from the common law, and does not greatly vary the law in relation to it. If one offers a watch to another for one hundred dollars, and the other accepts, and forthwith tenders the money, he acquires a property in the watch at common law; if he accepts, but does not pay or tender the price,

cases, therefore, do not bear much on the general question. The main argument relied upon by those who contend that shares are not within the statute, is this: that the statute provides that such contract shall not be good, &c., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods of which part may be delivered. This seems, however, to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods, &c., shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which, from their nature, it cannot apply. There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the terms goods, as they are within the reason and policy of the act, the court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing in the present case, the plaintiff is not entitled to maintain this action." And see, to the same effect, Colvin *v.* Williams, 3 Harris & J. 38; North *v.* Forest, 15 Conn. 400; Southern Life Ins & Tr. Co. *v.* Cole, 4 Fla. 359. But the decision in this last case was based, in some measure, upon the fact that the Florida statute contains, in addition to the words used in the English statute, the words "personal property."

(*k*) See preceding note.

(*l*) In Baldwin *v.* Williams, 3 Met. 365, it was decided, that a contract for the sale of promissory notes is within the statute. But see *contra*, Whittemore *v.* Gibbs, 4 Foster, 484. So also, in Beers *v.* Crowell, Dudley, Ga. 28, it was decided, that treasury checks on the Bank of the United States were not within the statute.

(*m*) McKnight *v.* Dunlop, 1 Seld. 537; Marsh *v.* Hyde, 3 Gray, 331.

the property does not pass, and the vendor is not bound by the contract, which is presumed to have contemplated payment on the spot. (*n*) But if the buyer, when he accepted the offer, gave something by way of earnest, and it was accepted as such, this bound the parties at common law. Neither could rescind the sale; but the buyer could tender the price at any time and demand the goods, and the seller could tender the goods, and after the time agreed on had expired, could sue for the price. This remains so under the statute, which does not seem to add any thing to the force or effect of the earnest.

The small value of the thing given as earnest, is no objection to it, but it would seem that it must have some value. A dime or a cent might suffice, but not a straw or a chip. And it must be actually given and received; merely touching or crossing the hand with it is not enough; (*o*) and it must be given and received as earnest.

Part payment has the same effect as earnest. But it must be an actual payment; and not a mere agreement that something shall be considered as a payment. Thus, if the seller owes the buyer, and part of the contract of sale is that the debt shall be discharged and go as part payment of the price, nevertheless, the contract must be in writing, because this is not an actual part payment. (*p*)

A question of considerable difficulty has been raised, as to whether, and how far, this section of the statute of frauds applies to executory contracts. If one agrees to buy at a future time, there are three forms which the contract may assume. One is to buy hereafter what is now existing; a second, to buy hereafter what is not now existing, but is to be supplied hereafter, for the sum agreed on, which is to be regarded only as the price of the article; the third is, to buy hereafter an article to be manufactured by the seller, and the bargain implies, that the money to be paid is for the manufacturing, as well as for the article.

In the earlier English decisions, it seems to have been held,

(*n*) See *ante*, vol. 1, pp. 519, 520.

(*o*) Blenkinsop *v.* Clayton, 7 Taunt. 597.

(*p*) Walker *v.* Nussey, 16 M. & W 302; Peña *v.* Vance, 21 Cal. 142.

for some time, as a settled rule of law, that no executory contract of sale was within this section of the statute. (*q*) But this doctrine was overthrown by Lord *Loughborough*, who, however, admitted, that where an executory contract of purchase and sale provided for work and labor upon the article previous to its delivery, and important materials to be furnished, the agreement was not within the statute. (*r*) The ruling of Lord *Loughborough* is, however, open to the objection that it conflicts with what seems to be a perfectly well-established principle; that if an entire and inseparable contract be in part within the statute and in part without, it must altogether comply with the terms of the statute, or no action can be brought upon it. And yet he holds, that an agreement for the purchase of corn, to be delivered hereafter, is not within the statute, if any threshing is to be done upon it in the mean time, because the price of the corn will pay for this threshing.

There have been, since that time, many cases turning upon this question, and it is impossible to reconcile them all with any acknowledged principle of statutory construction. It must, indeed, be impossible to frame any rules which shall be always applicable without difficulty to this question; but this difficulty

(*q*) See Towers *v.* Osborne, 1 Stra. 506; Clayton *v.* Andrews, 4 Burr. 2101; Alexander *v.* Comber, 1 H. Bl. 20.

(*r*) Rondeau *v.* Wyatt, 2 H. Bl. 63. In this case the plaintiff and defendant entered into a verbal agreement for the sale of 3,000 sacks of flour, to be delivered to the plaintiff at a future period; and this agreement was *held* to be within the statute. Lord *Loughborough*, in delivering the judgment of the court, said: "It is singular that an idea could ever prevail, that this section of the statute was only applicable to cases where the bargain was immediate, for it seems plain, from the words made use of, that it was meant to regulate executory, as well as other contracts. The words are, '*No* contract for the sale of any goods,' &c. And, indeed, it seems that this provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent. The case of Simon *v.* Motivos, 3 Burr. 1921, was decided on the ground, that the auctioneer was the agent as well for the defendant as the plaintiff, and therefore, that the contract was sufficiently reduced into writing. The case of Towers *v.* Sir John Osborne, 1 Stra. 506, was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labor to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. In Clayton *v.* Andrews, 4 Burr. 2101, which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be threshed before the delivery. This, perhaps, may seem to be a very nice distinction, but still the work to be performed in threshing, made, though in a small degree, a part of the contract."

may arise, as remarked by the Supreme Court of Massachusetts, (*s*) "not so much from any uncertainty in the rule, as from the infinitely various shades of different contracts." From general principles, however, illustrated by recent decisions, we should draw the following rules. A pure executory contract for the sale of goods, wares, or merchandises, is as much within the statute, as a contract of present sale. (*t*) A contract for an article not now the seller's, or not existing, and which must therefore be bought or manufactured before it can be delivered, will also be within the statute, if it may be procured by the seller by purchase from any one, or manufactured by himself at his choice, the bargain being in substance as well as form, only, that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price. But if the contract states or implies that the thing is to be made by the seller, and also blends together the price of the thing and compensation for work, labor, skill, and material, so that they cannot be discriminated, it is not a contract of purchase and sale, but a contract of hiring and service, or a bargain by which one party undertakes to labor in a certain way for the other party, who is thereupon to pay him certain compensation; and this contract is, therefore, not within the statute. (*u*) And these rules will be found to reconcile

(*s*) In Gardner *v.* Joy, 9 Met. 177.

(*t*) Cooper *v.* Elston, 7 T. R. 14; Bennett *v.* Hull, 10 Johns. 364; Jackson *v.* Covert, 5 Wend. 139; Downs *v.* Ross, 23 Wend. 270; Garbutt *v.* Watson, 5 B. & Ald. 613; Smith *v.* Surman, 9 B. & C. 561; Cason *v.* Cheely, 6 Ga. 554; Rondeau *v.* Wyatt, 2 H. Bl. 63.

(*u*) This distinction is well explained and illustrated in Hight *v.* Ripley, 19 Me. 137. In that case the defendant agreed with the plaintiff "to furnish, as soon as practicable," 1,000, or 1,200 lbs. of malleable hoe shanks, agreeable to patterns left with him; and to furnish a larger amount, if required, at a diminished price. And the court held, that this must be considered as a contract for the manufacture of the articles referred to, and so not within the statute of frauds. *Shepley*, J., said: "It may be considered as now settled, that the statute of frauds embraces executory as well as executed contracts for the sale of goods. But it does not prevent parties from contracting verbally for the manufacture and delivery of articles. The only difficulty now remaining is, to decide whether the contract be one for the sale, or for the manufacture and delivery of the article. It may provide for the application of labor to materials already existing partially or wholly in the form designed, and that the article improved by the labor shall be transferred from one party to the other. In such cases there may be difficulty in ascertaining the intentions; and the distinction may be nice, whether it be a contract for sale or for manufacture. The decision in the case of Towers *v.* Osborne, 1 Stra. 506, is esteemed to have been correct, while the reasons for it are rejected as erroneous. The chariot bespoken does not appear to have existed at the time, but to have been manufactured to order. In Garbutt *v.* Watson, 5 B. & Ald. 613, the contract was 'for the sale of 100 sacks of flour, at 50*s.* per sack, to be got ready by

most of the recent authoritative decisions on this subject. We think also that this will be found to be the true meaning and

the plaintiff to ship to the defendant's order, free on board, at Hull, within three weeks.' There was an attempt to exclude it from the statute, because the plaintiffs were millers, and had not the flour then ground and prepared for delivery. But the contract did not provide that they should manufacture the flour; they might have purchased it from others, and have fulfilled all its terms. It was decided to be a contract for the sale of the flour, and within the statute. If the contract be one of sale, it cannot be material whether the article be then in the possession of the seller, or whether he afterward procure or make it. A contract for the manufacture of an article, differs from a contract of sale, in this: the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind, purchased from another, and not made for him. It is the peculiar skill and labor of the other party, combined with the materials, for which he contracted and to which he is entitled. Hence it has been said, that if the article exist at the time in the condition in which it is to be delivered, it should be regarded as a contract for sale. In Crookshank *v.* Burrell, 18 Johns. 58, the contract was, that the defendant should make the wood-work of a wagon for the plaintiff by a certain time; and it was decided not to be a contract for sale. In the case of Mixer *v.* Howarth, 21 Pick. 205, the contract was, that the plaintiff should finish for the defendant a buggy, then partly made; and it was decided not to be a contract for sale. The contract in this case provides, that the defendants should 'furnish, as soon as practicable, 1,000 or 1,200 lbs. of malleable hoe shanks, agreeably to patterns left with them.' They were to be 'delivered at their furnace.' There is a provision, that the defendants may immediately receive orders for a larger amount, say 2,000 lbs. more than heretofore stated, and that 'the whole amount is (in such case) to be charged at a diminished price.' Taking into consideration all the provisions of the contract, there can be little doubt that it was the intention of the parties, that the defendant should manufacture the shanks at their furnace, agreeably to certain patterns which had been left with them. There is no evidence in the case tending to prove, that the articles were then existing in the form of the pattern. It may be fairly inferred that they were not, but were to be made as soon as practicable. The testimony presented does not then prove a contract for the sale of goods, but rather one for the manufacture of certain articles of a prescribed pattern, by order of the plaintiff." Again, in Gardner *v.* Joy, 9 Met. 177, it appeared that A asked B what he would take for candles; B said he would take twenty-one cents per pound; A said he would take one hundred boxes; B said the candles were not manufactured, but he would manufacture and deliver them in the course of the summer. *Held*, that this was a contract for the sale of goods, within the statute of frauds. And *Shaw*, C. J., said: "It was essentially a contract of sale. The inquiry was for the price of candles; the quantity, price, and terms of sale were fixed, and the mode in which they should be put up. The only reference to the fact that they were not then made and ready for delivery, was, in regard to the time at which they would be ready for delivery; and the fact that they were to be manufactured, was stated as an indication of the time of delivery, which was otherwise left uncertain." And see Mixer *v.* Howarth, 21 Pick. 205; Spencer *v.* Cone, 1 Met. 283; Lamb *v.* Crafts, 12 id. 353; Waterman *v.* Meigs, 4 Cush. 497; Watts *v.* Friend, 10 B. & C. 446; Cason *v.* Cheely, 6 Ga. 554; Bird *v.* Muhlinbrink, 1 Rich. 199; Hardell *v.* McClure, 1 Chand. 271. Until quite recently, however, both in this country and in England, it was held, that all contracts for the sale of articles not then existing in the state in which they were to be delivered, were out of the statute. See Rondeau *v.* Wyatt, 2 H. Bl. 63, cited *supra;* Groves *v.* Buck, 3 M. & S. 178; Crookshank *v.* Burrell, 17 Johns. 58; Sewall *v.* Fitch, 8 Cowen, 214. And such the Superior Court of the City of New York has recently declared to be still the law of New York. Robertson *v.* Vaughn, 5 Sandf. 1. In that case the defendant made a contract with the plaintiff, to make and deliver to him, at a specified time, one thousand molasses shooks and heads. And this was held to be a contract for work and labor, and so not within the statute. *Duer*, J., said: "We certainly think that this case is within the mischief that the statute of frauds was designed to prevent, and

effect of the statute of 9 Geo. IV. c. 14, in extension of the statute of frauds. (v)

It is to be noticed, that while some of the sections of the statute of frauds declare the oral contracts which they are intended to prevent, utterly void, the fourth section only provides that no action shall be brought upon the promises, or for the purposes therein enumerated, and the seventeenth, that no contract specified therein shall "be allowed to be good," *unless* there be earnest, part payment, part delivery and acceptance, or a writing signed. The distinction is sometimes important; nor

that the contract between the parties was substantially a contract for the sale of goods and merchandise, and not for work and labor. But we cannot shut our eyes to the fact, that the case of Sewall *v.* Fitch, 8 Cow. 215, as the counsel for the defendant found himself under the necessity of admitting, is not distinguishable from the present; and that no conflicting decisions are to be found in our own reports. The contract, which the Supreme Court in that case held not to be within the statute, bore an entire analogy to that between the parties now before us, with the single exception that it related to nails instead of shooks. It is true, that it would not be easy to reconcile Sewall *v.* Fitch with the cases in England and Massachusetts, to which we were referred; but for more than twenty years it has been considered as evidence of the law in this State; and as such, has doubtless been followed in numerous instances by inferior tribunals. Under these circumstances, we think that it belongs only to the court of ultimate jurisdiction to set aside the authority of the decision, and correct the error which it probably involves. If all contracts between merchants and manufacturers for the purchase of goods, *to be thereafter manufactured*, are to be excepted from the statute of frauds, there seems to be little reason for retaining at all those provisions of the statute which relate to the sale of goods to be delivered on a future day, since it is hardly possible to imagine an exception more arbitrary in its nature, and more contrary to the policy upon which the statute is admitted to be founded. Such an exception, embracing, as it does, a very large class of cases, frequently of great amount in value, is, in its principle, equivalent to a repeal; and either the law itself should be abolished, as imposing a needless restraint upon the transaction of business, or, if the sound policy of the law must be admitted, an exception, repugnant to its spirit and destructive of its utility, should no longer be permitted to exist. A new statute, similar to 9 Geo. 4, c. 14, seems to be required, and should the attention of the legislature be directed to the subject, would probably be passed; but we are not legislators, and as judges, must administer the law as we find it established." And see Bronson *v.* Wiman, 10 Barb. 406. But in the late case of Courtright *v.* Stewart, 19 Barb. 455, it was held, that an agreement by a mechanic to furnish materials and do the carpenter work and turning according to a specified plan and specification, for buildings to be erected upon the land of another, is not a contract for the sale of goods within the meaning of the statute. It was there laid down, that the true criterion for determining whether the contract is for the sale of *goods* and therefore within the statute, or for *work and labor* and so not within the statute, is to inquire, whether the work and labor required in order to prepare the subject-matter of the contract for delivery, is to be done for the vendor himself or for the vendee. In the former case the contract is really a contract of sale, while in the latter it is a contract of hiring.

(v) By that statute it is enacted, that "the provisions of the statute of frauds shall extend to all contracts for the sale of goods to the value of 10*l.* or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

is it adequately expressed in the cases which say that these oral contracts, embraced within the fourth section, are not void, but voidable, by the statute of frauds. We consider them neither void, nor voidable. If they were good at common law, they remain good now, for all purposes but that expressly negatived by the statute; that is, no action can be brought upon them, but in other respects they are valid contracts. (*w*) The nature

(*w*) Shaw *v.* Shaw, 6 Vt. 69; Philbrook *v.* Belknap, id. 383; Minns *v.* Morse, 15 Ohio, 568; Whitney *v.* Cochran, 1 Scam. 209; Dowdle *v.* Camp, 12 Johns. 451; Sims *v.* Hutchins, 8 Smedes & M. 328; Souch *v.* Strawbridge, 2 C. B. 808; Crane *v.* Gough, 4 Md. 316. This point is well illustrated by the recent case of Leroux *v.* Brown, 12 C. B. 801, 14 Eng. L. & Eq. 247. That was an action to recover damages for the breach of a parol contract entered into at Calais, in France, by which the defendant, who resided in England, agreed with the plaintiff, a British subject residing at Calais, to employ the plaintiff as the defendant's agent, to collect eggs and poultry at Calais, and to send them over to the defendant in England, the service to be one year from a future day, at 100*l.* a year. The plaintiff proved, that by the law of France, this contract, though not in writing, was valid, and could be enforced by the courts in that country. The defendant set up the 4th section of the statute of frauds as a defence. And the question was, whether that section applied to the validity of the contracts embraced within it, or only to the mode of procedure upon them. The court held, that the latter was the true construction of the statute, and therefore that the action could not be maintained. *Jervis*, C. J., said: "There has been no discussion at the bar as to the principles which ought to govern our decision. It is admitted by the plaintiff's counsel, that if the 4th section of the statute of frauds applies not to the validity of the contract, but only to the mode of procedure upon it, then that, as there is no 'agreement or memorandum, or note thereof,' in writing, this action is not maintainable. On the other hand, it is not denied that, if that section applies to the contract itself, or, as Boullenois says, to the 'solemnities' of the contract, inasmuch as our law does not affect to regulate foreign contracts, the action is maintainable. On consideration, I am of opinion that the 4th section does not apply to the 'solemnities' of the contract, but to the proceedings upon it; and therefore that this action cannot be maintained. The 4th section, looking at it in contrast with the 1st, 2d, 3d, and 17th, leads to this conclusion. The words are, 'No action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized.' It does not say, that, unless those requisites are complied with, the contract shall be void, but only that 'no action shall be brought upon it;' and, as put by Mr. Honyman, with great force, the alternative, requiring the 'agreement or some memorandum thereof' to be in writing, shows that the legislature contemplated a contract good before any writing, but not enforceable without the writing, as evidence of it. This view, which the words of the statute present, is also, I think, in conformity with the authorities. The cases cited by the very learned author of the Law of Vendors and Purchasers, and the practice of the courts of equity, show that if any writing be subsequently made and signed by the party to be charged with the agreement, there is a sufficient compliance with the 4th section to enable the other party to enforce the agreement. Authority and practice, therefore, are both in conformity with the words of the statute. But it is said that the cases of Carrington *v.* Roots, 2 M. & W. 248, and Reade *v.* Lamb, 6 Exch. 130, are inconsistent with this view. It is sufficient to say, that the attention of the learned judges who decided those cases, was not directed to the particular point raised by the present case. What the court said in those cases was, that for the purposes of the action in those particular

or effect of the contract is not changed; but the statute points out certain modes of conforming or verifying the contract, which are essential to the maintenance of an action upon it. Hence, on the one hand, it supplies no want, as of consideration, or, in other words, makes no contract good, which would not be good without it. And, on the other hand, the contract is valid as to third parties, although the statute has not been complied with; (*x*) and, if the contract has been fully executed, the statute has no power over it whatever, and no effect upon the rights duties, and obligations of the parties. (*y*)

instances, there was no difference between the effect of the 4th and 17th sections. It must not be forgotten that the meaning of those sections has been explained in other cases. In Crosby *v.* Wadsworth, 6 East, 602, Lord *Ellenborough* says: 'The statute,' that is, the 4th section, 'does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them.' The same view is adopted by *Tindal,* C. J., and *Bosanquet,* J., in Laythoarp *v.* Bryant, 2 Bing. N. C. 735, from which it appears, that the contract is good antecedent to any writing, and that the effect of the fourth section is, not to avoid it, but to bar the remedy upon it, unless there be writing. I therefore think, that an action on the contract in this case will not lie in this country, because the 4th section relates merely to the mode of procedure, and not to the validity of the contract. This view is not inconsistent with what has been cited from Boullenois, who is speaking of what pertains '*ad vinculum obligationis et solemnitatem,* and not of what relates to the mode of procedure." *Talfourd,* J.: "I think Mr. Honyman's argument, drawn from Laythoarp *v.* Bryant, and those cases which decide that the writing required by the statute may be a letter from the party to be charged, to a third person, containing the terms of the agreement, conclusively shows, that the 4th section does not render the contract absolutely void, but only applies to the mode of procedure upon it."

(*x*) Cahill *v.* Bigelow, 18 Pick. 369; Bohannon *v.* Pace, 6 Dana, 194.

(*y*) Stone *v.* Dennison, 13 Pick. 1. In this case the plaintiff and defendant had entered into a contract, by virtue of which the plaintiff was to enter into the defendant's service, and continue for several years, at a stipulated rate of compensation. The plaintiff entered into the defendant's service accordingly, and continued for the stipulated time, and the defendant paid him the stipulated compensation. Subsequently this action was brought to recover an additional compensation, upon a *quantum meruit.* The defendant interposed the executed contract as a defence, and was sustained by the court. *Shaw,* C. J., said: "The contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a *quantum meruit,* as upon an implied promise. But the statute does not make such a contract void. The provision is, that no action shall be brought, whereby to charge any person upon any agreement, which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties, and obligations of the parties resulting from such performance, stand unaffected by the statute. In the case of Boydell *v.* Drummond, 11 East, 142, a case was put in the argument, of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract was the payment of the price, which was not to be performed within the year, a question is made, whether, by force of the statute, the purchaser is exempted from the obligation of the agreement, as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. 'In that case,' said Lord *Ellenborough,* 'the delivery of the

Of the other sections of this statute it will not be necessary to say much. Those which relate to wills, lie entirely without the scope of this work; and those in relation to trusts, almost as much so. The first, second, and third sections relate to leases, and these sections are subject to so many important modifications in this country, the provisions respecting them in the several States, being not only diverse from the statute, but from each other, that an examination of the questions which have arisen under the English statute, and of the adjudication which has settled these questions, would not be of much use.

It should be said, however, that equity has held that a part performance of a contract takes the case out of the statute; either on the ground of fraud, (z) or on the presumption of an unproved agreement which satisfies the requirements of the statute. (a) Much doubt has been expressed as to the wisdom or expediency of this rule; (b) but it seems now to be well established. But the efforts to make the same rule operative at law, (c) have wholly failed; and the *dicta* which asserts this rule at law, have been overruled. (d) And even in equity, it is

goods, which is supposed to be made within the year, would be a complete execution of the contract, on the one part; and the question of consideration only would be reserved to a future period.' If a performance upon one side would avoid the operation of the statute, *a fortiori* would the entire and complete performance on both sides have that effect. Take the common case of a laborer, entering into a contract with his employer, towards the close of a year, for another year's service, upon certain stipulated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action, whereby to charge the other upon such contract. But it would be a very different question, were the contract fulfilled upon both sides, by the performance of the services on the one part, and the payment of money on account, from time to time, on the other, equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a *quantum meruit* and recover more, or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received, and recover back part of the money advanced, on the ground, that by the statute of frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute. We are of opinion, that it has no application to executed contracts, and that the evidence of this contract was rightly admitted." And see *ante*, p. 39.

(z) See Roberts on Frauds, p. 130, *et seq.*

(a) See Roberts on Frauds, p. 130, *et seq.*

(b) See Lindsay *v.* Lynch, 2 Sch. & L. 1; Forster *v.* Hale, 3 Ves. 696, 712.

(c) Brodie *v.* St. Paul, 1 Ves. Jr. 326; Davenport *v.* Mason, 15 Mass. 85; Baldwin *v.* Palmer, 10 N. Y. (6 Seld.), 232.

(d) Cooth *v.* Jackson, 6 Ves. 39; Kidder *v.* Hunt, 1 Pick. 331; Adams *v.* Townsend, 1 Met. 483; Norton *v* Preston, 15 Me. 14; Jackson *v.* Pie ce, 2 Johns. 224; Baldwin *v.* Palmer, 10 N. Y. (6 Seld.), 232.

established with some qualifications, or, rather, requirements. Thus, the equitable rule is mainly applied, if not wholly confined to contracts for the sale of lands or some interest in them; and nothing is a part performance for this purpose, which is only ancillary or preparatory; (*e*) it must be a direct act which is intended to be a substantial part of the performance of an obligation created by the contract; (*f*) and it must be an act which would not have been done but for the contract; (*g*) and it must be directly in prejudice of the party doing the act, who must himself be the party calling on this ground, for the completion of the contract. (*h*)

(*e*) See Roberts on Frauds, p. 139.

(*f*) Jones *v.* Peterman, 3 S. & R. 543; Johnston *v.* Glancey, 4 Blackf. 94; Morphett *v.* Jones, 1 Swanst. 172; *Ex parte* Hooper, 19 Ves. 477.

(*g*) Frame *v.* Dawson, 14 Ves. 386; Gunter *v.* Halsey, Ambl. 586; Phillips *v.* Thompson, 1 Johns. Ch. 149.

(*h*) See Roberts on Frauds, p. 138, and Buckmaster *v.* Harrop, 7 Ves. 341.

CHAPTER VI.

THE STATUTE OF LIMITATIONS.

Sect. 1.—*The General Purpose of the Statute.*

Any tribunal which inquires into the validity of a claim, must admit that its age is among the elements which determine the probability of its having a legal existence and obligation. The natural course of events is for him who owes a debt, to pay it; and for him to whom a debt is due, to demand it; and any conduct which is opposite to this, is exceptional. And human experience tells us, that it is very rare, in point of fact, for a creditor to let a claim, which is enforceable at law, lie, for a long period, not only unpaid, but uncalled for. This improbability the common law recognized; and when the claim was old enough, it considered the improbability too strong to be overthrown by the mere fact of an original debt, and no evidence of payment; in other words, it raised a presumption of payment after many years; this period is generally, now almost universally, twenty years; and it still applies to all personal claims which are not limited by the statute of limitations. (*a*) But this was not an absolute presumption, because it could be rebutted by acts or words on the part of the debtor, which were incompatible with such payment. At length, the statute, 21 James I., c. 16, enacted, among other things, that all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, or contract without specialty, and all actions of debt for arrearages of rent, should be commenced

(*a*) Duffield *v.* Creed, 5 Esp. 52; Cooper *v.* Turner, 2 Stark. 497; Christophers *v.* Sparke, 2 Jacob & W. 223.

and sued within six years next after the cause of such actions or suit, and not after.

It is not quite certain, from the selection of the claims to which this statute applies, whether it proceeded upon the same ground as the legal presumption; that is, actual probability of payment; for while these claims are such as would very seldom be suffered to be long unsettled, and the excepted claims, as those of accounts between merchants, and those grounded on specialty, are often permitted to go on without liquidation for a considerable period, it is also true that this latter class of claims might become old without becoming stale, and should be excepted from a statute of limitations which went on the ground that the actions which it prohibited ought not to be brought after a certain time, whether the debts were paid or not, because they ought not to be suffered to lie unsettled so long. And some of the earlier decisions of the questions which soon arose under this statute, would lead to the supposition that the courts then regarded it as a statute of repose, and not one of presumption. (*b*) Soon, however, the other view prevailed; and a long course of decisions occurred, which can be justified and explained only on the supposition that the statute is to be construed as one of presumption, and of rebuttable presumption. (*c*) Gradually, however, this view gave way to the first; and it may now be considered as the established rule, that the statute proceeds upon the expediency of refusing to enforce a stale claim, whether paid or not, and not merely on

(*b*) Bland *v.* Haselrig, 2 Vent. 151; Dickson *v.* Thompson, 2 Show. 126; Lacon *v.* Briggs, 3 Atk. 105; Bass *v.* Smith, 12 Vin. Abr. 229, pl. 4; Owen *v.* Wolley, Bull. N. P. 148; Andrews *v.* Brown, Prec. in Ch. 386; Hyleing *v.* Hastings, 1 Ld. Raym. 389, 421; Sparling *v.* Smith, id. 741.

(*c*) Yea *v.* Fouraker, 2 Burr. 1099; Quantock *v.* England, 5 Burr. 2628; Richardson *v.* Fen, Lofft, 86; Lloyd *v.* Maund, 2 T. R. 760; Catling *v.* Skoulding, 6 id. 189; Lawrence *v.* Worrall, Peake, N. P. 93; Clarke *v.* Bradshaw, 3 Esp. 155; Bryan *v.* Horseman, 5 Esp. 81, 4 East, 599; Rucker *v.* Hannay, 4 East, 604, n. (a); Gainsford *v.* Grammar, 2 Camp. 9; Leaper *v.* Tatton, 16 East, 420; Loweth *v.* Fothergill, 4 Camp. 185; Dowthwaite *v.* Tibbut, 5 M. & S. 75; Beale *v.* Nind, 4 B. & Ald. 568; Clarke *v.* Hougham, 2 B. & C. 149; Frost *v.* Bengough, 1 Bing. 266; Colledge *v.* Horn, 3 Bing. 119; Triggs *v.* Newnham, 1 C. & P. 631; East India Co. *v.* Prince, Ryan & M. 407; Sluby *v.* Champlin, 4 Johns. 461; DeForest *v.* Hunt, 8 Conn. 179; Aiken *v.* Benton, 2 Brev. 330; Lee *v.* Perry, 3 McCord, 552; Glenn *v.* McCullough, Harper, 484; Burden *v.* M'Elhenny, 2 Nott & McC. 60; Sheftall *v.* Clay, R. M. Charlt. 7; Bishop *v.* Sanford 15 Ga. 1.

the probability that a stale claim has been paid; and this expediency is the actual basis of the law of limitations. This change we deem one of extreme importance. The tendency to it caused much of the conflict and uncertainty which attended the adjudication upon this statute in England. The prevalence of the new view gave rise at length to Lord *Tenterden's* act in England, (*d*) which has been adopted in many of our States, and found to work very beneficially; and in the construction of this statute, or in the consideration of questions arising under the earlier statutes of limitations, where they remain in force, we consider that the principle which will hereafter be applied, will be that which regards the statute of limitations as a statute, not of presumption, but of repose.

A very little observation will show that these two views lead to results, which are not only distinctly different, but antagonistic. This difference may be stated theoretically thus: If the statute of limitation be a statute of presumption, then it is taken away by whatever will rebut the presumption; and this is any thing which implies or amounts to an acknowledgment that the debt still exists. But if it be a statute of repose, then it remains in force, unless the debtor renounces its benefit and protection, and voluntarily makes a new promise to pay the old debt. It is true, that immediately after the enactment of the statute of James, if the statute were pleaded, the only replication was "a new promise." But when issue was joined on this replication, the plaintiff made out his case by showing only a new acknowledgment. And it was a gradual progress in the courts, which finally led them to require, that this acknowledgment should be such, in fact, as amounted to a promise. Thus, Lord *Mansfield* said, (*e*) "The slightest acknowledgment has been held sufficient, as saying, 'Prove your debt, and I will pay you;' 'I am ready to account, but nothing is due to you.' And much slighter acknowledgments than these will take a case out of the statute." And in our notes will be seen decisions or dicta which are not less extreme. (*f*) But on what principle can they rest,

(*d*) 9 Geo. IV. c. 14.

(*e*) In Trueman *v.* Fenton, Cowper,

(*f*) Thus, in Richardson *v.* Fen, Lofft, 86, it appeared that the defendant met a man in a fair, and said he went to the fair

for a moment, except that which looks upon limitation as founded on actual probability of payment? And connected with these decisions grew up an opinion among courts, that the plea of the statute was dishonorable, and not to be favored. (*g*) So late as in 1830, Mr. Justice Story (*h*) spoke very strongly, — in a passage we shall presently have occasion to quote at length, — of his own recollection of an extreme and inexcusable endeavor of the courts to take from the operation of the statute of limitations, all cases in which any words or phrases of the supposed debtor could be strained into an admission of the debt. But even so early as in 1702, it was said by the Court of King's Bench, (*i*) that "The statute of limitations, on which the security of all men depends, is to be favored." And we give, in a note, acknowledgments which have been held insufficient to take the case out of the statute, although, if the authorities,

to avoid the plaintiff, to whom he was indebted. This was held to be a sufficient acknowledgment to take the case out of the statute, there being no other debt between them. And in Lloyd *v.* Maund, 2 T. R. 760, it was held, that a letter written by the defendant to the plaintiff's attorney on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amounted to an acknowledgment of the debt, so as to take it out of the statute. And *Ashhurst*, J., said: "It is certainly true, that any acknowledgment will take the case out of the statute of limitations. Now, though this letter is written in ambiguous terms, there are some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt. Throughout the whole of it, the defendant does not deny the existence of the debt." So in Bryan *v.* Horseman, 4 East, 599, it was *held*, that an acknowledgment of a debt, though accompanied with a declaration by the defendant "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted," was sufficient to take the case out of the statute. So in Leaper *v.* Tatton, 16 East, 420, in assumpsit against the defendant, as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos.* And Lord *Ellenborough* said: "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumption of payment, if his own acknowledgment that he has not paid be shown, it does away the statute." And again, in Clark *v.* Hougham, 2 B. & C. 154, *Bayley*, J., said: "The statute of limitations is a bar, on the supposition, after a certain time, that a debt has been paid, and the vouchers lost. Wherever it appears, by the acknowledgment of the party, that it is not paid, that takes the case out of the statute. Leaper *v.* Tatton, 16 East, 420; Dothwaite *v.* Tibbut, 5 M. & S. 75. And according to those cases it makes no difference whether the acknowledgment be accompanied by a promise or refusal to pay. Mountstephen *v.* Brooke, 3 B. & Ald. 141, shows that an acknowledgment to a third person is sufficient."

(*g*) Willet *v.* Atterton, 1 W. Bl. 35; Perkins *v.* Burbank, 2 Mass. 81.

(*h*) In Spring *v.* Gray, 5 Mason, 523.

(*i*) In Green *v.* Rivett, 2 Salk. 421.

stated in a previous note, had been followed, most of these, if not all, must have been held sufficient to constitute a new promise. (*j*) And at length, through a series of decisions, going

(*j*) Thus, in A'Court *v.* Cross, 3 Bing. 329, defendant, being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, and I will never pay it; this was held not such an acknowledgment as would revive the debt against a plea of the statute of limitations. And per *Best*, C. J., "The courts have said, acknowledgment of a debt is sufficient, without any promise to pay it, to take a case out of the statute. I cannot reconcile this doctrine, either with the words of the statute, or the language of the pleadings. The replication to the plea of non-assumpsit *infra sex annos*, is that the defendant did undertake and promise within six years. The mere acknowledgment of a debt is not a promise to pay it; a man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment that he promises to pay it; yet without regarding the circumstance under which an acknowledgment was made, the courts, on proof of it, have presumed a promise. It has been supposed that the legislature only meant to protect persons who had paid their debts, but from lapse of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The legislature thought, that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal power of recovering it. I think, if I were now sitting in the Exchequer Chamber, I should say that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the statute of limitations. But I should not, after the cases that have been decided, be disposed to go so far in this court, without consulting the judges of the other courts." So in Ayton *v.* Bolt, 4 Bing. 105, where the defendant being applied to to pay a debt barred by the statute of limitations, said he should be happy to pay it if he could; it was held, that the plaintiff must show the defendant's ability to pay, the court saying that the case fell within the rule laid down in A'Court *v.* Cross. And in Tanner *v.* Smart, 6 B. & C. 603, in assumpsit, brought to recover a sum of money, the defendant pleaded the statute of limitations, and upon that issue was joined. At the trial, the plaintiff proved the following acknowledgment by the defendant within six years: "I cannot pay the debt at present, but I will pay it as soon as I can;" *held*, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. And Lord *Tenterden* said, "There are, undoubtedly, authorities that the statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt; and that though such an acknowledgment is accompanied with only a conditional promise, or even a refusal to pay, the law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial ought to be discharged. But if there are conflicting authorities upon the point, if the principles upon which the authorities I have mentioned are founded, appear to be doubtful, and the opposite authorities more consonant to legal rules, we ought, at least, to grant a new trial, that the opportunity may be offered of having the decision of a court of error upon the point, and that for the future we may have a correct standard by which to act. . . . . . If an acknowledgment had the effect which the cases in the plaintiff's favor attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute; whereas the constant replication, ever since the statute, to let in evidence of

to show that the statute is intended for the relief and quiet of defendants, the law reached the conclusion, justly and forcibly expressed by Mr. Justice *Story*, in the case to which we have before referred. (*k*) He says: "I consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory, or death, or removal of witnesses. The defence, therefore, which it puts forth, is an

an acknowledgment is, that the cause of action accrued (or the defendant made the promise in the declaration) within six years; and the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them (though it may show clearly *that the debt never has been paid*, but is still a subsisting debt), the plaintiff fails." His lordship then proceeds to an elaborate review of the authorities, and continues: "All these cases proceed upon the principle, that under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect." And see Fearn *v.* Lewis, 4 Moore & P. 1; Brigstocke *v.* Smith, 1 Cromp. & M 483; Haydon *v.* Williams, 7 Bing. 163; Cory *v.* Bretton, 4 C. & P. 462; Morrell *v* Frith, 3 M. & W. 402; Routledge *v.* Ramsay, 8 A. & E. 221; Williams *v.* Griffith, 3 Exch. 335; Cawley *v.* Furnell, 12 C. B. 291; Smith *v.* Thorn, 18 Q. B. 134, 10 Eng. L. & Eq. 391; Hart *v.* Prendergast, 14 M. & W. 741. In this last case, *Parke*, B., said: "There is no doubt of the principle of law applicable to these cases, since the decision in Tanner *v.* Smart; namely, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay, coupled with a condition, he must show performance of the condition; so as in either case to fit the promise laid in the declaration, which is a promise to pay on request. The case of Tanner *v.* Smart put an end to a series of decisions which were a disgrace to the law, and I trust we shall be in no danger of falling into the same course again." For recent American cases to the same effect, see Gilkyson *v.* Larue, 6 Watts & S. 213; Morgan *v.* Walton, 4 Penn. St. 321; Laforge *v.* Jayne, 9 id. 410; Christy *v.* Flemington, 10 id. 129; Gillingham *v.* Gillingham, 17 id. 303; Kyle *v.* Wells, id. 286; Bell *v.* Crawford, 8 Gratt. 110; Ross *v.* Ross, 20 Ala. 105; Ten Eyck *v.* Wing, 1 Mann. (Mich.), 40; Butterfield *v.* Jacobs, 15 N. H. 140; Ventris *v.* Shaw, 14 id. 422; Sherman *v.* Wakeman, 11 Barb. 254; Ellicott *v.* Nichols, 7 Gill, 85; Mitchell *v.* Sellman, 5 Md. 376; Carruth *v.* Paige, 22 Vt. 179; Phelps *v.* Williamson, 26 Vt. 230; Hayden *v.* Johnson, id. 768; Cooper *v.* Parker, 25 id. 502; Hill *v.* Kendall, id. 528; Brainard *v.* Buck, id. 573; Pritchard *v.* Howell, 1 Wis. 131; Deloach *v.* Turner, 6 Rich. 117, 7 id. 143; Butler *v.* Winters, 2 Swan, 91; Brown *v.* Edes, 37 Me. 318; Broddie *v.* Johnson, 1 Sneed, 464. And see the leading case of Bell *v.* Morrison, 1 Pet. 351.

(*k*) See *ante*, p. 64, n. (*h*).

honorable defence, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practicable manner, such as are ancient and unacknowledged; and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers and evidence to repel them. The natural presumption certainly is, that claims which have been long neglected are unfounded, or at least are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance, or their over-confidence in regard to transactions which have become dim by age. Yet I well remember the time when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defence; and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admissions of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation."

SECTION II.

OF A NEW PROMISE.

The law may not be yet entirely settled, as to what shall constitute the new promise which removes the bar of the statute. But, without now taking into consideration Lord *Tenterden's* act, requiring the new promise to be in writing, we think we may draw from the multitudinous decisions on the subject, the following conclusions, as established law.

The first and most general of these is, that there must be either an express promise, or an acknowledgment expressed in such words, and attended by such circumstances, as give to it

the meaning, and therefore the force and effect of a new promise. (*l*) Such, we think, is the rule, although it must be admitted that it has been sometimes applied, even of late, with great laxity.

Whether an acknowledgment is thus equivalent to a new promise, or is sufficient to remove the bar of the statute, is a question which must be determined either by the court or the jury; and it does not seem to be quite settled within which province it lies. We should say, however, in general, that where this question is one of intention, and is to be gathered from the words spoken, and from the circumstances of the case to be considered in connection with the words, there it is for the jury, under the instruction of the court as to the principles applicable to the question, to determine whether the acknowledgment be sufficient or not. But where the question is one of the meaning of words only, and especially where the words relied upon are written, and the question becomes, in effect, one of the construction of a written document, there it is the duty of the court to make, and of the jury to receive, a distinct direction. (*m*)

(*l*) See upon this point the leading case of Tanner *v.* Smart, 6 B. & C. 603, cited in the preceding note. "According to the recent cases," says *Parke*, B., in Morrell *v.* Frith, 3 M. & W. 405, "the document, in order to take the case out of the statute, must either contain a promise to pay the debt on request, or an acknowledgment from which such promise is to be inferred." In Hart *v.* Prendergast, 14 M. & W. 746, *Rolfe*, B., said: "The principle is said to be, that the document must contain either a promise to pay the debt, or an acknowledgment from which such a promise is to be inferred. Perhaps it would be more correct to say, that it must, in all cases, contain a promise to pay, but that, from a simple acknowledgment, the law implies a promise: but there must, in all cases, be a *promise*, in order to support the declaration." Again, in Bell *v.* Morrison, 1 Pet. 362, Mr. Justice *Story* says: "If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved, in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries." See further the English and American cases cited in the preceding note.

(*m*) In Lloyd *v.* Maund, 2 T. R. 760, the acknowledgment was contained in a letter,

It is not necessary that the acknowledgment should be of any precise amount; (*n*) but if there be an admission of any debt, and of legal liability to pay it, evidence may be connected with this admission to show the amount; (*o*) and even if the parties differ as to the amount, an admission of the debt may remove the bar of the statute. (*p*) But the acknowledgment must not be of a mere general indebtedness. (*q*) It must be, on the one hand, broad enough to include the specific debt in question; (*r*) and on the other, sufficiently precise and definite in its terms to show that this debt was the subject-matter of the acknowledgment. (*s*) So a general direction to pay debts, or a general provision for their payment, does not operate as a new promise by the testator; (*t*) and an acknowledgment, to revive a debt, should in fact amount to, or imply a promise to pay it. (*u*)

and yet the question whether the acknowledgment was sufficient was submitted to the jury. The same course was pursued in Frost *v.* Bengough, 1 Bing. 266; and in Bird *v.* Gammon, 3 Bing. N. C. 883, where the like course was pursued, and a new trial was moved for, on that among other grounds, *Tindal*, C. J., said: "The first objection taken for the defendant is, that it was left to the jury to say what was the effect of the letter. But by a chain of cases, from Lloyd *v.* Maund to Frost *v.* Bengough and others, it appears that such has been the constant course." But the authority of these cases was much shaken, if not entirely overthrown, by the case of Morrell *v.* Frith, 3 M. & W. 402. See *ante*, Vol. II. p. 492. And see Clarke *v.* Dutcher, 9 Cowen, 674; Chapin *v.* Warden, 15 Vt. 560; Martin *v.* Broach, 6 Ga. 21; Love *v.* Hackett, id. 486; Watkins *v.* Stevens, 4 Barb. 168.

(*n*) Thus, in Dickinson *v.* Hatfield, 1 Moody & R. 141, Lord *Tenterden* ruled that a promise to pay "the balance due, is sufficient to take a case out of the statute of limitations, although no mention is made of the amount of the balance. And see, to the same effect, Lechmere *v.* Fletcher, 1 Cromp. & M. 623; Bird *v.* Gammon, 3 Bing. N. C. 883; Waller *v.* Lacy, 1 Man. & G. 54; Gardner *v.* M'Mahon, 3 Q. B. 561; Williams *v.* Griffith, 3 Exch. 335; Hazlebaker *v.* Reeves, 12 Penn. St. 264; Davis *v.* Steiner, 14 id. 275; Dinsmore *v.* Dinsmore, 21 Me. 433.

(*o*) Cheslyn *v.* Dalby, 4 Young & C. 238; Spong *v.* Wright, 9 M. & W. 629; Barnard *v.* Bartholomew, 22 Pick. 291. See also cases cited in preceding note. But see Kittredge *v.* Brown, 9 N. H. 377.

(*p*) Colledge *v.* Horn, 3 Bing. 119; Gardner *v.* M'Mahon, 3 Q. B. 561. See Collis *v.* Stack, 1 H. & N. 605.

(*q*) Moore *v.* Hyman, 13 Ired. 272; Shaw *v.* Allen, 1 Busbee, 58; McBride *v.* Gray, id. 420; Robbins *v.* Farley, 2 Strobh. 348; Harbold *v.* Kuntz, 16 Penn. St. 210; Shitler *v.* Bremer, 23 id. 413; Zacharias *v.* Zacharias, id. 452; Buckingham *v.* Smith, 23 Conn. 453.

(*r*) Barnard *v.* Bartholomew, 22 Pick. 291.

(*s*) Id.; Stafford *v.* Bryan, 3 Wend. 532; Arey *v.* Stephenson, 11 Ired. 86; Martin *v.* Broach, 6 Ga. 21; Clarke *v.* Dutcher, 9 Cowen, 674; Suter *v.* Sheeler, 22 Penn. St. 308. But if only one debt is shown to exist, the acknowledgment will be presumed to refer to that. Woodbridge *v.* Allen, 12 Met. 470; Guy *v.* Tams, 6 Gill, 82.

(*t*) Bloodgood *v.* Bruen, 4 Sandf. 427; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Carrington *v.* Manning, 13 Ala. 611; Braxton *v.* Wood, 4 Gratt. 25; Murray *v.* Mechanics Bank, 4 Edw. Ch. 567; Walker *v.* Campbell, 1 Hawks, 304; Freake *v.* Cranefeldt, 3 Mylne & C. 499, Evans *v.* Tweedy, 1 Beav. 55.

(*u*) Rackham *v.* Marriott, 1 H. & N. 234; Sidwell *v.* Mason, 2 H. & N. 306.

As the acknowledgment must be such as to be equivalent to a promise, if it be in other respects full and complete, but is expressly guarded and qualified by the maker so that it negatives a promise, or cannot be construed into a promise, it is not sufficient. (*v*) As if the debtor says, "I know that I owe the money, but I have a legal defence, and will not pay it," this is not enough to prevent the operation of the statute; (*w*) and therefore we say that the acknowledgment must be not only of the debt, but of a legal liability to pay the debt. It is true that the *naked* acknowledgment of the debt implies, and, as it were, contains, an acknowledgment of legal liability; but there is no room for this implication, where this liability is denied and excluded; *because* the statute is not one of presumption, but of repose. Therefore, also, the acknowledgment may be conditional, or subject to whatever qualification the debtor thinks proper to make. And in that case, the acknowledgment becomes a new promise, or, in other words, the bar of the statute is removed, only when the creditor can show that the condition has been performed; or that the event has happened, or the time arrived, by a reference to which the acknowledgment was qualified. (*x*) But it does not seem to be necessary, even in England, where pleading is more exact than here, to declare

(*v*) In Tanner *v.* Smart, 6 B. & C. 609, Lord *Tenterden* said: "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule '*expressum facit cessare tacitum*' apply?" And see Mitchell *v.* Sellman, 5 Md. 376, and the cases cited *ante*, 65, n. (*j*).

(*w*) A'Court *v.* Cross, 3 Bing. 329. In this case the defendant, being arrested on a debt more than six years old, said: "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, and I will never pay it;" and this was *held* not such an acknowledgment as would revive the debt against a plea of the statute of limitations. And *Best*, C. J., said: "There are many cases from which it may be collected, that if there be any thing said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the statute of limitations." So in Danforth *v.* Culver, 11 Johns. 146, which was an action on a promissory note, to which the statute of limitations was pleaded, it appeared, that within a year of the trial, and after the commencement of the suit, the defendant, on being shown the note, admitted that he had executed it, but said it was outlawed, and that he meant to avail himself of the statute of limitations; and this was held not to be sufficient evidence of a promise to pay within six years. And see Douglass *v.* Elkins, 8 Foster, 26.

(*x*) Tompkins *v.* Brown, 1 Denio, 247; Hill *v.* Kendall, 25 Vt. 528; Humphreys *v.* Jones, 14 M. & W. 1; Butterfield *v.* Jacobs, 15 N. H. 140; Bullock *v.* Smith, 15 Ga. 395. And see cases cited *ante*, p. 65, n. (*j*).

upon the promise as conditional. (*y*) If an acknowledgment be on its face, or in its direct meaning, full and unconditional, it is competent to show, by other admissible evidence, as of the *res gestæ*, that it was not intended as an acknowledgment, but for a different purpose. (*z*) And by parity of reason, it would seem to be competent to show, that doubtful expressions were meant and understood by the parties to operate as a condition or qualification. So, if an acknowledgment be made, and at the same time a discharge of the debt be given, the acknowledgment is of no force, although the discharge be void. (*a*)

The acknowledgment must be voluntary; (*b*) but whether this applies to admissions made under process of law, as by a bankrupt on his examination, is not quite certain; but the present weight of authority is, perhaps, in favor of the sufficiency of this acknowledgment. (*c*) We should doubt, however, whether this bare acknowledgment ought to be held as the equivalent of a new promise.

It is uncertain whether every new item and credit, in a mutual and running account, given by one party to the other, is an admission and acknowledgment of an unsettled account, and evidence of a promise to pay the balance, whatever that account and balance may appear to be, so as to take the whole account out of the statute. The affirmative of this question is maintained by numerous decisions; (*d*) but we think these

(*y*) Irving *v.* Veitch, 3 M. & W. 90; Edmunds *v.* Downes, 2 Cromp. & M. 459, 4 Tyrw. 173; Haydon *v.* Williams, 7 Bing. 168, 4 Moore & P. 811; Gardner *v.* M'Mahon, 3 Q. B. 561.

(*z*) Cripps *v.* Davis, 12 M. & W. 159.

(*a*) Goate *v.* Goate, 1 H. & N. 29.

(*b*) Arnold *v.* Downing, 11 Barb. 554.

(*c*) In Eicke *v.* Nokes, 1 Moody & R. 359, it was *held*, that an entry, in a bankrupt's examination, of a certain sum being due to A, is a sufficient acknowledgment to take the case out of the statute of limitations. But in Brown *v.* Bridges, 2 Miles, 424, where A and B, being indebted to C, filed their petition for the benefit of the insolvent laws, in which they stated, in their schedule of debts, the debt due to C; it was *held*, that this was not a sufficient acknowledgment to take the debt out of the statute. And the court said: "An *acknowledgment* of a debt, to prevent the operation of the statute of limitations, must at least be consistent with a *promise* to pay. This is the law in Pennsylvania. The acknowledgment in defendant's petition for the benefit of the insolvent laws, is not of this character, for the very basis on which an insolvent asks his discharge is that he is *unable* to pay his debt. How this can be tortured into a promise to pay, or as being consistent with such a promise, we are at a loss to discover." And see, to the same effect, Christie *v.* Flemington, 10 Penn. St. 129. See further, Kennett *v.* Milbank, 8 Bing. 38; Wellman *v.* Southard, 30 Me. 425; Pott *v.* Clegg, 16 M & W. 321.

(*d*) A leading case upon this point is Catling *v.* Skoulding, 6 T. R. 189. It was there held, that if there be a mutual

decisions are inconsistent with the views which now prevail in regard to new promises and acknowledgments; and we doubt

account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute of limitations. And Lord *Kenyon* said, "It is not doubted but that a promise or acknowledgment within six years will take the case out of the statute; and the only question is, whether there is not evidence of an acknowledgment in the present case. Here are mutual items of account; and I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account, given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily experience teaches us, that if this rule be now overturned, it will lead to infinite injustice." Perhaps this decision is consistent with the views then prevailing in respect to new promises and acknowledgments; but it is submitted that it cannot be sustained upon principle, since the decision in Tanner *v.* Smart in England, and Bell *v.* Morrison in this country. And this is the view adopted by the Superior Court of New Hampshire, in Blair *v.* Drew, 6 N. H. 235; though some of the reasoning of *Parker*, J., goes even further. In delivering the judgment of the court, he says: "Upon what principle is it, that a sale of an article upon credit is an admission of any thing else except that the subject-matter of that transaction had existence? Upon what principle does it admit the existence of an unsettled account upon the other side, or draw after it any thing else? If, in the nature of things, there could not be an account consisting of a single item, it might well be said that the charge of one item was an admission of something more. If, in the ordinary transaction of business, there could not be an account upon one side, without an account upon the other to balance it, in whole or in part, there would be some foundation for such admission. But every day's experience negatives all this; accounts exist upon one side only; and of no more than a single item. The purchase is made — the credit is given — and this is all the dealing between the parties. Many of the decisions upon the statute of limitations, much controverted, if not exploded, were founded on the assumption, that the statute was based upon a presumption of payment, and of consequence, any admission that the debt was unpaid, rebutted the presumption and took the case out of the statute. Granting the premises, the conclusion followed well enough. But even upon that view of the statute, the position is wholly untenable, that an item of credit constitutes an admission of another preëxisting debt upon the other side, and an admission, moreover, that it has not been paid. Aside from the statute of limitations, such doctrine of admission would receive no countenance whatever. No jurist would ever argue, that because he had proved one item of account, it was any evidence from which a jury might infer and find other distinct and independent items. Still less would it be contended, that an account, proved by the plaintiff, was an admission which furnished evidence in favor of another account of independent items, offered by the defendant, or that it was of any weight to prove the defendant's account, even in connection with other evidence. And if it furnishes no evidence of admission, in such case, it can raise no fair admission as against the statute. No admission, then, of any account upon the other side, can be fairly inferred from the act of making a charge on account against any individual. It is no admission of an unsettled account, beyond the very charge itself. It does not imply that the party giving the credit has any other item of claim against the party charged. Still less does it imply that the party against whom the charge is made, has an account to balance it, in whole or in part. It is of itself a distinct and independent transaction; and it might with just as much propriety be said, that a party making a charge of an item of account, thereby admits that it is paid, in whole or in part, as to say that he thereby admits the existence of an unsettled account against himself. Nay, it would be safer for the individual to hold him as making such an admission,

whether they would be followed in any jurisdiction where the question is still open.

SECTION III.

OF PART PAYMENT.

A part payment of a debt has always been held to take it out of the statute; (*e*) the six years being counted from such

which could extend no further than in discharge of the demand which constituted the acknowledgment; whereas, holding the admission to extend to an unsettled account against himself, may subject him, in connection with fabricated evidence, or from a loss of vouchers or testimony, to the payment of pretended claims upon the other side, of an amount vastly beyond the small item, by the charge of which he has drawn down such consequences upon himself. We cannot deem it any objection to our reasoning upon this subject, that there may be cases where an account upon one side may be recovered, while one upon the other side of older date is barred. If it be so it will arise from the *laches* of the party. If articles upon one side are delivered in payment of a prior existing account upon the other, the delivery raises no cause of action. If not delivered in payment, each account is distinct and independent, as much so as promissory notes held upon the one side and the other; and there is as much reason why a party should not avail himself of an account, which is barred by the statute, in discharge of another account due from him, and to which he has no other defence, as there is that he should not avail himself of a promissory note which is barred, in the same way, or that he should not recover that, or any other demand which is barred, in an independent suit upon the demand itself. We have endeavored to examine this subject with all the care and attention which the importance of the principle involved, and a high respect for the learned tribunals whose decisions have been adverse to the opinion now expressed, demands of us. Consistently with the principles of repeated decisions in this court, that in order to raise a new promise by implication from an acknowledgment, it must contain a direct and unqualified admission of a subsisting debt, which the party is liable and willing to pay; we cannot hold that one item in an account has of itself any force or effect to take other items, which would otherwise be barred, out of the statute." See also, Livermore *v.* Rand, 6 Foster, 85. And the same view is adopted in Kentucky. Lansdale *v.* Brashear, 3 T. B. Mon. 330; Smith *v.* Dawson, 10 B. Mon. 112. And in Tennessee. Craighead *v.* The Bank, 7 Yerg. 399. But it must be admitted that the main current of American decisions is still in accordance with Catlin *v.* Skoulding. See Kimball *v.* Brown, 7 Wend. 322; Chamberlain *v.* Cuyler, 9 id. 126; Sickles *v.* Mather, 20 id. 72; Todd *v.* Todd, 15 Ala. 743; Wilson *v.* Calvert, 18 id. 274; Cogswell *v.* Dolliver, 2 Mass. 217; Davis *v.* Smith, 4 Greenl. 337; Abbott *v.* Keith, 11 Vt. 529; Hodge *v.* Manly, 25 id. 210. But see the opinions of the learned judges in the two last cases. In England, this question was set at rest by Lord *Tenterden's* act, very soon after Tanner *v.* Smart was decided. See Williams *v.* Griffiths, 2 Cromp., M. & R. 45; Mills *v.* Fowkes, 7 Scott, 444; Cottam *v.* Partridge, 4 Scott, N. R. 819. Care must be taken not to confound the above cases with cases concerning "merchants' accounts," which we shall consider hereafter.

(*e*) Whipple *v.* Stevens, 2 Foster, 219 In this case the court say: "It is well settled that a partial payment of a debt amounts to an acknowledgment of a present subsisting debt, which the party is liable and willing to pay; from which, in the absence of any act or declaration on the part of the party making the payment, inconsistent with the idea of a liability and willingness to pay, a jury may and

payment. And this is so, though the payment is made by goods or chattels, which it is agreed shall be given and received as payment. (*f*) And even where the debtor gives the creditor his negotiable promissory note or bill of exchange, on account of a larger debt, (*g*) it is held to operate as part payment. It

ought to infer a new promise." And see Stump *v.* Henry, 6 Md. 201, and cases cited *infra*. And part payment to an administrator has the same effect to extend the statute as if made to the debtor himself. Baxter *v.* Penniman, 8 Mass. 134; Bodger *v.* Arch, 10 Exch. 333, 28 Eng. L. & Eq. 464.

(*f*) Hart *v.* Nash, 2 Cromp., M. & R. 337; Hooper *v.* Stevens, 4 A. & E. 71; Cottam *v.* Partridge, 4 Scott, N. R. 819.

(*g*) This was decided in Massachusetts, in the case of Ilsley *v.* Jewett, 2 Met. 168. But the decision was put upon the ground, that in that State the giving of such note or bill is *prima facie* evidence of payment and discharge of the debt for which it is given. A similar decision, however, has been made in the recent case of Turney *v.* Dodwell, 3 Ellis & B. 136, 24 Eng. L. & Eq. 92, in England, where no such rule prevails. That was an action by the plaintiff, and payee of a promissory note against the defendant, as maker. The defendant pleaded the statute of limitations. It appeared upon the trial, that the defendant, being indebted to the plaintiff, on the 5th of May, 1843, gave to him the note sued on, for 108*l.* 15*s.* In February, 1848, the defendant, having been pressed to pay part of the debt, accepted a bill of exchange, drawn upon him by the plaintiff, for 30*l.*, in part payment of the promissory note. And this was held sufficient to take the note out of the statute of limitations. Lord *Campbell*, in delivering the judgment of the court, said: "The only question in this case was, whether a part payment by a bill of exchange, drawn by the plaintiff and accepted by the defendant, was sufficient to take the case out of the statute of limitations. The circumstances under which the acceptance was given, were such as to show that the payment was made as a part payment of the whole amount due, so as to raise the implication of a fresh promise, and therefore, to be an answer to the defence of the statute of limitations, if the part payment by bill were a part payment within the 9 Geo. 4, c. 14. It was said, on the part of the defendant, and we think correctly, that we ought to assume that the payment in question was not an absolute payment in satisfaction, so as to be a discharge if the bill were dishonored. If the payment had been one of absolute satisfaction, no question could have arisen; and we have, therefore, to consider whether the payment, in the usual manner in which bills of exchange are given and taken in payment, is a payment within the proviso of the 9 Geo. 4, c. 14, by which the effect of part payment is preserved. The council for the defendant referred us to the case of Gowan *v.* Forster, 3 B. & Ad. 507, where a doubt was expressed as to whether the drawing of a bill was a sufficient acknowledgment, within the 9 Geo. 4, c. 14, and to the case of Foster *v.* Dawber, 6 Exch. 839, where the Court of Exchequer thought, that under the circumstances no promise to pay any balance could be implied in the particular case; but there is nothing to show that they thought that a part payment by bill might not be an acknowledgment, to take the case out of the statute of limitations, as to the remainder. On the other hand, in the case of Irving *v.* Veitch, 3 M. & W. 90, the expressions used by the learned barons lead us to suppose that they thought such part payment by bill sufficient. In both Gowan *v.* Forster, and Irving *v.* Veitch, it was unnecessary to determine the point now in question, as the courts most properly held that the acknowledgment, if any, was at the time of delivering the bills in part payment, and not at their subsequent payment by the parties on whom the bills in those cases were drawn. At the trial, in the present case, the Lord Chief Justice of the Common Pleas held, that the part payment was sufficient to take the case out of the statute of limitations, and we entirely concur in that ruling. Before the statute 9 Geo. 4, such a part payment was clearly sufficient to take the case out of the statute of limitations, as amounting to an acknowledgment of the balance being due; and the real question is, whether

must, however, be certain, that payment is made only as a part of a larger debt; for, in the absence of conclusive testimony, it will not be deemed an admission of any more debt than it pays. (*h*)

such payment by bill, though not received in absolute satisfaction, is not a payment within the proviso in that statute. The effect of giving a bill of exchange on account of a debt, is laid down in *Maule*, J., in the recent case of Belshaw *v.* Bush, 11 C. B. 191, approving the doctrine of the Court of Exchequer, in Griffiths *v.* Owen, 13 M. & W. 58, and of *Alderson*, B., in James *v.* Williams, 13 M. & W. 833. In all those authorities such a delivery of a bill is laid down as a conditional payment. We do not see why its immediate operation, as an acknowledgment of the balance of the demand being due, is at all affected by its operation as a payment being liable to be defeated at a future time. The statutes intending to make a distinction between mere acknowledgments, by word of mouth, and acknowledgments proved by the act of payment, it surely cannot be material whether such payment may afterwards be avoided by the thing paid turning out to be worthless. The intention and the act by which it is evinced remain the same. We think that the word 'payment' must be taken to be used by the legislature in a popular sense, and in a sense large enough to include the species of payment in question; and we should think the acknowledgment of liability as to the remainder of the debt, not at all altered by the fact of the notes, by which it was paid, turning out to be forged, or of the coin turning out to be counterfeit. In all these cases, the force of the acknowledgment is the same, and the payment is, we think, a sufficient payment within the words of the 9 Geo. 4. In Maillard *v.* The Duke of Argyle, 6 Man. & G. 40, the Court of Common Pleas distinctly held, that the word 'payment,' as applicable to a transaction of this kind, even when used in a plea, did not mean payment in satisfaction, but might be treated as used in its popular sense; and *Maule*, J., in that case, says, 'that "payment" is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises.' When you speak of paying by cash, that means in satisfaction, but when by bill, that does not import satisfaction unless the bill is ultimately taken up. In Belshaw *v.* Bush, the Lord Chief Justice of the Common Pleas, in speaking of a transaction of this nature, says: 'The real answer is, that upon this record you have been paid your debt;' and in the very report now before us, the learned Lord Chief Justice calls the present transaction a part payment. In mercantile transactions, nothing is more usual than to stipulate for a payment by bills, where there is no intention of their being taken in absolute satisfaction. We are satisfied that a transaction of this nature is properly described by the word 'payment,' and that it is clearly within the class of acknowledgments intended to be unaffected by the statute; and we are satisfied that there is no reason whatever to restrict the expression in the statute to that species of payment which imports a final satisfaction. The defendant's case, which rested entirely on the proviso in the 9 Geo. 4 being so restricted, therefore fails in its foundation; and we think that where a bill of exchange has been so delivered in payment, on account of the debt, as to raise an implication of a promise to pay the balance, the statute of limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill."

(*h*) Tippets *v.* Heane, 1 Cromp., M. & R. 252. This was an action of assumpsit, for meat, lodging, &c., furnished by the plaintiff for the defendant's son. The defendant pleaded the general issue. At the trial, before *Vaughan*, B., the plaintiff, to take the case out of the statute, proved by one A B that he had paid 10*l.* to the plaintiff, by the direction of the defendant, in the year 1829; but he could not speak to the account on which it was paid, or give any evidence beyond the mere fact of having paid the money by the defendant's direction. The learned Baron left it to the jury to say, whether the 10*l.* was paid on account of the debt in question; and observed to them that no other account was proved to have existed between the parties. The jury having found a verdict for the plaintiff, the Court of Exchequer granted a new trial, on the ground that

If, therefore, a debtor owes his creditor several debts, some of which are barred by the statute of limitations, and some are not, and pays a sum without appropriating it to any particular debt, although the creditor can appropriate the sum so paid to the debts that are barred, he cannot thereby take them out of the operation of the statute. (*i*) And it seems, that if there are two clear and undisputed debts, both of which are barred by the statute, and money is paid, but not appropriated to either debt by the debtor, the creditor cannot appropriate the payment, and thereby take the debt to which he applies it out of the statute. (*j*) But if one of the debts is admitted, the jury may apply the payment to that debt, rather than to those which are disputed. (*k*) If, however, money be paid, and there is with it an acknowledgment of further debt, and the debtor owes but one debt to the creditor, the payment will be applied to that debt, without words of appropriation by the debtor, and will have the effect of part payment. (*l*) But if payment be made, and with it words of denial or refusal as to the debt, or the residue of it, are used, this does not take the debt out of the stat-

there was no sufficient evidence of part payment to go to the jury. And *Parke*, B., said: "In order to take a case out of the statute of limitations, by a part payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here, the evidence does not show any particular account, to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and, perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt. Unless then, in the present case, it could be collected that the payment was in part of a greater debt, the statute was a bar, and there being no evidence from which a jury were warranted in coming to such a conclusion, the present rule must be made absolute." And see to the same effect, Linsell *v.* Bonsor, 2 Bing. N. C. 241; Waters *v.* Tompkins, 2 Cromp., M. & R. 726; Waugh *v.* Cope, 6 M. & W. 824; Wainman *v.* Kynman, 1 Exch. 118; Davies *v.* Edwards, 7 id. 22; Smith *v.* Westmoreland, 12 Smedes & M. 663; McCullough *v.* Henderson, 24 Miss. 92; Alston *v.* State Bank, 4 Eng. 455; State Bank *v.* Wooddy, 5 id. 638; Wood *v.* Wylds, 6 id. 754; Arnold *v.* Downing, 11 Barb. 554; Hodge *v.* Manley, 25 Vt. 216; Pickett *v.* King, 34 Barb. 193.

(*i*) Mills *v.* Fowkes, 5 Bing. N. C. 455; Nash *v.* Hodgson, 6 De G., M. & G. 474, 31 Eng. L. & Eq. 555. But see Ayer *v.* Hawkins, 19 Vt. 26. And see *ante*, Vol. II. p. 630, n. (*o*).

(*j*) Burn *v.* Boulton, 2 C. B. 476. And see State Bank *v.* Wooddy, 5 Eng. 638; Wood *v.* Wylds, 6 id. 754. See also, Pond *v.* Williams, 1 Gray, 630.

(*k*) Burn *v.* Boulton, 2 C. B. 476.

(*l*) Evans *v.* Davies, 4 A. & E. 840.

ute. (*m*) If the debt consists of principal and interest, a payment on account of either will take the whole residue of both out of the statute. (*n*) If there be mutual accounts, and a balance be struck, it has been held that this converts the items allowed into a part payment, to take the case out of the statute. (*o*) And a payment, by the debtor *for* the creditor, and at his request, or to one whom the creditor owes, has the same effect as the payment *to* him. (*p*)

Lord *Tenterden's* act provides, "That nothing herein contained shall *alter*, or take away, or lessen the effect of any payment of any principle or interest made by any person." Hence, it leaves the fact of part payment to operate as before; but an interesting question has arisen, whether the preceding clause of the act, which requires that the new promise or acknowledgment shall be in writing, requires, by construction or implication, that an admission or acknowledgment of part payment shall be proved or verified by writing. The tendency of the English decisions, for some time, was to require this; (*q*) but

(*m*) Wainman *v.* Kynman, 1 Exch. 118.

(*n*) Parsonage Fund *v.* Osgood, 21 Me. 176; Bealey *v.* Greensdale, 2 Tyrw. 121, 2 Cromp. & J. 61; Sanford *v.* Hayes, 19 Conn. 591; Bradfield *v.* Tupper, 7 Exch. 27, 7 Eng. L. & Eq. 541.

(*o*) Thus, in Ashby *v.* James, 11 M. & W. 542, it was *held*, that where A has an account against B, some of the items of which are more than six years old, and B has a cross account against A, and they meet and go through both accounts, and a balance is struck in A's favor, this amounts to an agreement to set off B's claim against the earlier items of A's, out of which arises a new consideration for the payment of the balance, and takes the case out of the operation of the statute of limitations, notwithstanding the provisions of Lord *Tenterden's* act. And Lord *Abinger* said: "I think Lord *Tenterden's* act does not apply at all to the fact of an account stated where there are items on both sides." [His Lordship read the act.] "This is not an acknowledgment or promise by words only; it is a transaction between the parties, whereby they agree to the appropriation of items on the one side, item by item to the satisfaction, *pro tanto*, of the account on the other side. The act never intended to prevent parties from making such an appropriation." And *Alderson*, B., said: "The courts have never laid it down that an actual statement of a mutual account will not take the case out of the statute of limitations. They have indeed determined that a mere parol statement of, and promise to pay, an existing debt, will not have that effect; because to hold otherwise would be to repeal the statute. The truth is, that the going through an account, with items on both sides, and striking a balance, converts the *set-off* into *payments;* the going through an account where there are items on one side only, as was the case in Smith *v.* Forty, 4 C. & P. 126, does not alter the situation of the parties at all, or constitute any new consideration. Here the striking of a balance between the parties is evidence of an agreement that the items of the defendant's account shall be set-off against the earlier items of the plaintiff's, leaving the case unaffected, either by the statute of limitations, or the set-off." And see Worthington *v.* Grimsditch, 7 Q. B. 479.

(*p*) Worthington *v.* Grimsditch, 7 Q. B. 479.

(*q*) See Willis *v.* Newham, 3 Young & J. 518; Waters *v.* Tompkins, 2 Cromp., M. & R. 723; Bayley *v.* Ashton, 12 A. &

when the question arose in this country, it was held that the statute should be construed as leaving the matter of part payment where it was before, both as to the evidence of it, and as to its effect. (*r*) And the same view has recently been adopted in England, in the Exchequer Chamber. (*s*) It has been held,

E. 493; Maghee *v.* O'Neil, 7 M. & W. 531; Eastwood *v.* Saville, 6 id. 615.

(*r*) See Williams *v.* Gridley, 9 Met. 482; Sibley *v.* Lumbert, 30 Me. 253.

(*s*) Cleave *v.* Jones, 6 Exch. 573. This was an action on a promissory note, for £350, with interest. The defendant pleaded the statute of limitations. At the trial, the only evidence given by the plaintiff to take the case out of the statute, was the following unsigned entry in a book of the defendant, and in her handwriting: "1843. Cleave's interest on £350, £17 10s." *Held*, in the Exchequer Chamber, reversing the judgment of the court below, that this was sufficient evidence of payment of interest to the plaintiff to take the case out of the statute of limitations. And Lord *Campbell*, in delivering the judgment of the court, said: "The time has come when Willis *v.* Newham, having been brought before a court of error, must be overruled. The question on this record is, whether an entry in an account-book of the defendant, in her handwriting, by which there is a statement that she has within six years paid interest upon the promissory note on which the action is brought, is evidence for the jury to take the case out of the statute of limitations. It was held by the learned Judge who tried this case, in deference to that decision, that it was not. We are to determine that question. If Willis *v.* Newham was well decided, the learned Judge was fully justified in saying that the entry was not evidence to go to the jury; for this very case is put in Willis *v.* Newham, and it is there asked, whether such an acknowledgment would be sufficient; and the learned Baron who delivered the judgment of the court, answers 'no; because the act says, the defendant shall not be charged except by an acknowledgment in writing, signed by him.' Does the act say so or not? In our opinion the act says no such thing; and we cannot extend the provisions of the statute from a desire to prevent mischief in *consimili casu*. The preamble of the 9 Geo. 4, c. 14, recites, that 'questions have arisen as to the proof and the effect of acknowledgments and promises offered in evidence for the purpose of taking the case out of the operation of the statute of limitations;' and the statute then goes on to legislate so as to guard against such questions afterwards arising. Before this statute passed, according to the construction of the 21 Jac. 1, c. 16, three modes were in practice to take a case out of the operation of that statute: first, an acknowledgment by words only; secondly, a promise by words only; and thirdly, part payment of principal or interest. Let us then see whether the 9 Geo. 4, c. 14, does not confine itself to the two first, leaving the third precisely as it was before that statute passed. The words are, 'that in actions of debt, &c., no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract,' to take the case out of the statute, 'unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby.' Does that lessen the effect of the proof of payment of principal or interest? It does not; but is confined to acknowledgments or promises by words only; and part payment of principal or interest is not an acknowledgment by words, but by conduct. If the statute had stopped there, it would not have met the case of part payment; but to guard against all danger of such a construction being put upon it, there is a proviso in express terms, 'that nothing herein contained shall alter, or take away, or lessen the effect, of any payment of principal or interest,' &c. Does not that leave the effect and proof of payment exactly as it was before the statute passed? With deference to the Court of Exchequer, I think it does. That construction of the statute seems so plain, that it cannot be strengthened by further observation. If we say, as we feel bound to do, that Willis *v.* Newham was improperly decided, we must return to the true construction of the statute, and hold that the evidence rejected ought to have been submitted to the jury. It would indeed be strange if Lord *Tenterden* had introduced, or the legislature had passed, an act to

in England, that the written acknowledgment which the statute requires, must have the actual signature of the party himself, that of his agent not being sufficient. (*t*) We are not aware that this question has arisen in this country.

It is clear that the payment cannot revive the debt, unless it be made by one who had authority to bind the debtor; thus, a part payment by a wife, without specific authority from the husband, does not revive the debt as to him. (*u*)

SECTION IV.

OF NEW PROMISES AND PART PAYMENTS BY ONE OF SEVERAL JOINT DEBTORS.

There has been some conflict, and some change in the law, as to the effect of the acknowledgment, part payment, or new promise, of one of two or more joint debtors. And it is obvious that this must depend mainly upon the question whether the statute is viewed as one of repose, or one of presumption. If the latter is the true construction of the statute, as there is no reason why one of two joint debtors, as, for example, one of two who were partners in a firm that has been dissolved, should not know perfectly well whether the debt exists or not; and as there is a community of interest between him and the other joint debtors, and it may be supposed he would make no acknowledgment adverse to his own interest, if it were not true, it would follow, that the acknowledgment of one that it does exist, ought to bind all. But if the statute gives its protection, on the ground *either* that the debt is paid, *or*, if unpaid, shall

exclude evidence such as this, so likely to occur in the common course of business, and which is not open to fabrication, like a mere promise or acknowledgment by words, and, being *litera scripta*, cannot deceive. It is said that the effect of our decision will be to let in verbal evidence of payment; but the legislature must have thought that more mischief would arise from excluding than admitting it; otherwise they would have provided for this case, as well as that of a mere promise or acknowledgment by words only. For these reasons we are of opinion that a *venire de novo* ought to be awarded." And see Nash *v.* Hodgson, 6 De G., M. & G 474, 31 Eng. L. & Eq. 555.

(*t*) Hyde *v.* Johnson, 3 Scott, 289.

(*u*) Neve *v.* Hollands, 18 Q. B. 262.

not, and ought not, to be demanded, it is obvious that the acknowledgment by one debtor of the non-payment of the debt is not enough. He may bind himself by his acknowledgment or promise, if he choose to do so, but cannot bind the other party, unless he has authority to do so. And this we take to be the true test and measure of the effect of an acknowledgment by one of many joint debtors. If he that makes the acknowledgment had full authority to bind the others by an original promise, growing out of an entirely new transaction, as one partner in an existing firm has to bind the others, then the acknowledgment, if otherwise sufficient, may bind all, as the new promise of all; but not where this authority is wanting.

We cannot, however, assert that the view above presented is fully sustained by authority, although we think it not only deducible from the reason of the law, but sustained by modern adjudication, so far, at least, as to show that the tendency of authority is in this direction. (*v*) Nevertheless, our notes will

(*v*) It was decided in Whitcomb *v.* Whiting, 2 Doug. 652, that an acknowledgment, new promise, or part payment, by one of several joint debtors, would take the case out of the statute of limitations as to all. That was an action on a joint and several promissory note executed by the defendant and three others. The plaintiff having proved payment, by one of the other three, of interest on the note and part of the principal, within six years, it was *held*, that this was sufficient to take the case out of the statute as to the defendant. And Lord *Mansfield* said: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." And *Willes*, J., said: "The defendant has had the advantage of the partial payment, and therefore must be bound by it." It would seem that the court proceeded partly upon the then prevalent view, that the statutory bar was founded on a presumption of payment, and partly upon the ground that one joint debtor, in making a new promise, or acknowledgment, or part payment, acts in his own behalf, and also as agent for the rest The first ground, as we have already seen, no longer exists. And as to the second, it would be difficult to maintain upon principle that any such agency exists. This decision, however, though at times doubted (see Brandram *v.* Wharton, 1 B. &. Ald. 463; Atkins *v.* Tredgold, 2 B. & C. 23), has maintained its ground in England, and is now regarded there as sound law. See Perham *v.* Raynal, 2 Bing. 306; Burleigh *v.* Stott, 8 B. & C. 36; Pease *v.* Hirst, 10 id. 122; Wyatt *v.* Hodson, 8 Bing. 309; Manderston *v.* Robertson, 4 Man. & R. 440; Channell *v.* Ditchburn, 5 M. & W. 494. In this last case it was held, that payment of interest, by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the statute of limitations, as against the other maker. And *Parke*, B., said: "The question in this case was, whether payment of interest by one of two makers of a promissory note, made after the lapse of six years from the time when the note became due, took the case out of the statute of limitations with regard to the other co-maker. Mr. Platt relied upon the case of Atkins *v.* Tredgold, and Slater *v.* Lawson, as making a distinction, and throwing a doubt upon the old case of Whitcomb *v.* Whiting, which decided that one of two joint makers of a promissory note might,

show, that in some cases a part payment has barred the statute, and revived a remedy against others who were only sure-

by acknowledgment or part payment, take the case out of the statute, as against the other. After those two cases, undoubtedly some degree of doubt might fairly exist as to the propriety of the decision in Whitcomb *v.* Whiting; and it does seem a strange thing to say, that where a person has entered into a joint and several promissory note with another person, he thereby makes that other his agent, with authority, by acknowledgment or payment of interest, to enter into a new contract for him. But since the decisions in Atkins *v.* Tredgold, and Slater *v.* Lawson, the Court of King's Bench have twice decided, that payment by one of two joint makers of a promissory note, is sufficient to take the case out of the statute, as against the other. The first of these cases was that of Burleigh *v.* Stott, where the defendant was sued as the joint and several maker of a promissory note; and there the court held, that payment of interest by the other joint maker was enough to take the case out of the statute, as against the defendant; and that it was to be considered as a promise by both, so as to make both liable. And since the decision in that case, the Court of King's Bench have come to the same conclusion, in the case of Manderston *v.* Robertson, which was argued on the 22d of May, 1829. I have discovered my paper book in that case, which, it appears, was argued by Mr. Platt himself; and the court decided there, that an account stated by one of the makers of a joint note, and part payment of the account, took the case out of the statute as to the other; thus confirming the authority of Burleigh *v.* Stott. Then Mr. Platt relies upon the distinction in this case, that the payment was made after the statute had run, and which was pointed out by Mr. Justice *Bayley* as one of the grounds on which he distinguished the case of Atkins *v.* Tredgold, from Whitcomb *v.* Whiting; that there the statute had attached, and that its operation could not be affected by any act of future payment. But I find that in Manderston *v.* Robertson, the note was dated the 9th of July, 1817, and an account was furnished by one of the joint makers, on the 1st of June, 1825, to the payee, taking credit to himself for payments of interest after the six years had elapsed, but not before; and it was held, that this was sufficient to take the case out of the statute, as against the other maker. There the payment was after the six years had elapsed, and yet it was held sufficient. The result is, that we must consider the case of Whitcomb *v.* Whiting as good law." Whitcomb *v.* Whiting has been followed also substantially in Massachusetts. Hunt *v.* Bridgham, 2 Pick. 581; White *v.* Hale, 3 id. 291; Frye *v.* Barker, 4 id. 382; Sigourney *v.* Drury, 14 id. 387; And in Maine, Getchell *v.* Heald, 7 Greenl. 26; Greenleaf *v.* Quincy, 3 Fairf. 11; Pike *v.* Warren, 15 Me. 390; Dinsmore *v.* Dinsmore, 21 id. 433; Shepley *v.* Waterhouse, 22 id. 497. But see *infra*, n. (*c*). And in Vermont, Joslyn *v.* Smith, 13 Vt. 353; Wheelock *v.* Doolittle, 18 id. 440. And in Connecticut, Bound *v.* Lathrop, 4 Conn. 336; Coit *v.* Tracy, 8 id. 268; Austin *v.* Bostwick, 9 id. 496; Clark *v.* Sigourney, 17 id. 511. And perhaps in some other States. See the recent case of Zent *v.* Heart, 8 Penn. St. 337. This case was overruled, however, in Coleman *v.* Fobes, 22 Penn. St. 156. Goudy *v.* Gillam, 6 Rich. 28; Bowdre *v.* Hampton, id. 208; Tillinghast *v.* Nourse, 14 Ga. 641. But in the Supreme Court of the United States, in the case of Bell *v.* Morrison, 1 Pet. 351, the authority of Whitcomb *v.* Whiting was repudiated. It is true, that the new promise in that case was not made until the debt was barred by the statute; but there is much reason to believe, that the decision of the court would have been the same, if the promise had been made before the debt was barred. *Story*, J., in delivering the opinion of the court, after quoting the language of Lord *Mansfield*, that "payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due;" says: "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party, who has authority to discharge, has necessarily, also, authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very position constitutes the matter in controversy. It is true, that a

ties. (*w*) And this even where the parties were bound severally, as well as jointly, to pay the debt, and the action is brought

payment by one does enure for the benefit of the whole; but this arises, not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet if the principle of Lord *Mansfield* be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made." And the Court of Appeals in New York, in two recent cases, have established the law in that State, in entire accordance with the view stated in the text. The first of these cases is Van Keuren *v.* Parmelee, 2 Comst. 523. It was there held, that, after the dissolution of the partnership, an acknowledgment and promise to pay, made by one of the partners, will not revive a debt against the firm which is barred by the statute of limitations. The decision, therefore, went no further than that in Bell *v.* Morrison, and consequently did not cover the case of a new promise or acknowledgment made before the debt is barred, nor determine whether there is any distinction in this respect between a new promise or acknowledgment and a part payment. After this case was decided, there was a difference of opinion in the Supreme Court, upon the two questions last noticed. See Bogert *v.* Vermilya, 10 Barb. 32; Dunham *v.* Dodge, id. 566; Reid *v.* McNaughton, 15 id. 168. But they were both set at rest by the Court of Appeals in Shoemaker *v.* Benedict, 1 Kernan, 176. It was there *held*, that payments made by one of the joint and several makers of a promissory note, before an action upon it is barred by the statute of limitations, and within six years before suit brought, do not affect the defence of the statute as to the other. And *Allen*, J., after examining the case of Van Keuren *v.* Parmelee, said: "Do the points in which this case differs from that decided in the Court of Appeals, take it without the principles decided, and without the statute of limitations? I think not. First: One point of difference is, that in this case partial payments, and not a promise or naked acknowledgment of the existence of the debt, are relied upon to take the case out of the statute. But partial payments are only available as facts, from which an admission of the existence of the entire debt and a present liability to pay may be inferred. As a fact by itself, a payment only proves the existence of the debt, to the amount paid, but from that fact courts and juries have inferred a promise to pay the residue. In some cases it is said to be an unequivocal admission of the existence of the debt; and in the case of the payment of money as interest, it would be such an admission in respect to the principal sum. Again, it is said to be a more reliable circumstance than a naked promise, and the reason assigned is, that it is a deliberative act, less liable to misconstruction and misstatement than a verbal acknowledgment. So be it. It is nevertheless only reliable as evidence of *a promise*, or from which a promise may be implied. Any other evidence which establishes such promise would be equally efficacious, and most assuredly, a deliberate written acknowledgment of the existence of the debt and promise to pay, is of a high character as evidence of a partial payment to defeat the statute of

(*w*) Burleigh *v.* Stott, 8 B. & C. 36; Wyatt *v.* Hodson, 8 Bing. 309; Sigourney *v.* Drury, 14 Pick. 387.

only against him who did not make the payment. (x) Where there was a dissolution of the partnership, and a subsequent part payment of a partnership debt, by a partner to a creditor who did not know of the dissolution, it was held to take the case out of the statute. (y) Where there were several securities for a debt, on some of which the debtor was liable alone, and on others jointly, a payment by him "on account," without

limitations. In either case the question is as to the weight to be given to evidence, and if a new promise is satisfactorily proved in either method, the debt is renewed. The question still recurs, who is authorized to make such promise? If one joint debtor could bind his co-debtors to a new contract, by implication, as by a payment of a part of a debt for which they were jointly liable, he could do it directly, by an express contract. The law will hardly be charged with the inconsistency of authorizing that to be done indirectly which cannot be done directly. If one debtor could bind his co-debtors by an unconditional promise, he could by a conditional promise, and a man might find himself a party to a contract, to the condition of which he would be a stranger. Second: Another fact relied upon to distinguish this case from Van Keuren v. Parmelee is, that the payments were made before the statute of limitations had attached to the debt, and while the liability of all confessedly existed. In some cases in Massachusetts, this, as well as the fact that the revival or continuance of the debt was effected by payment from which a promise was implied rather than by express promises, were commented upon by the court as important points. But I do not understand that the cases were decided upon the ground that these circumstances really introduced a new element or brought the cases within a different principle. The decisions, in truth, were based upon the authority of the decisions of the English courts, and prior decisions in the courts of that State. That a promise made while the statute of limitations is running, is to be construed and acted upon in the same manner as if made after the statute has attached, is decided, in Dean v. Hewitt, 5 Wend. 257, and Tompkins v. Brown, 1 Denio, 247. If the promise is conditional, the condition must be performed before the liability attaches so as to authorize an action. It does not, as a recognition of the existence of the debt, revive it absolutely from the time of the conditional promise. And in principle, I see not why a promise made before the statute has attached to a debt, should be obligatory when made by one of several joint debtors, when it would not be obligatory if made after the action was barred. The statute operates upon the remedy. The debt always exists. An action brought after the lapse of six years, upon a simple contract, must be upon the new promise, whether the promise was before or after the lapse of six years, express or implied, absolute or conditional. The same authority is required to make the promise before as after the six years had elapsed. Can it be said that one of several debtors can, on the last day of the sixth year, by a payment, small or large, or by a new promise, either express or implied, so affect the rights of his co-debtors as to continue their liability for another space of six years, without their knowledge or assent, or any authority from them, save that to be implied from the fact that they are at the time jointly liable upon the same contract, and yet that, on the very next day, without any act of the parties, such authority ceases to exist? If so, I am unable to discover upon what principle. And may the debt be thus revived, from six years to six years, through all time, or if not, what limit is put to the authority? If any agency is created, it continues until revoked. The decision of Van Keuren v. Parmelee, is upon the ground that no agency ever existed, not that an agency once existing has been revoked." The law is the same in New Hampshire. Exeter Bank v. Sullivan, 6 N. H. 124; Kelley v. Sanborn, 9 id. 46; Whipple v. Stevens, 2 Foster, 219. And in Tennessee. Belote v. Wynne, 7 Yerg. 534; Muse v. Donelson, 2 Humph. 166.

(x) Whitcomb v. Whiting, 2 Doug 652; Burleigh v. Stott, 8 B. & C. 36; Channell v. Ditchburn, 5 M. & W. 494.

(y) Tappan v. Kimball, 10 Foster, 136.

specification or appropriation, was held to revive them all (*z*) And such payment, by a joint debtor, has been held to revive the debt against the others, although the debtor made it in fraud, and in expectation of his bankruptcy. (*a*)

But in some instances, where the acknowledgment of one joint debtor is held to be *admissible* evidence of the promise of the others, the question is still reserved, whether it be sufficient evidence. As where one made an acknowledgment of a barred debt, due from him and another, under circumstances which showed that the acknowledgment was made for the sake of a personal benefit to himself, the evidence was admitted, but the jury were told that it was insufficient. (*b*) As to partners after dissolution, there is in this country much conflict; but, as we have already stated, we think the prevailing authorities are against the power of one, to bind others who were formerly partners with him, by his acknowledgment of a barred partnership debt. (*c*)

This whole question, so far as regards the effect of a new promise or acknowledgment, by one of several joint debtors, has been set at rest in England by Lord *Tenterden's* Act, which declares, in substance, that no joint contractor shall lose the

(*z*) Dowling *v.* Ford, 11 M. & W. 329. In this case, one Nodin having applied to the plaintiff for a loan of £300 on mortgage, the plaintiff, doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several promissory note for £50, from Nodin and the defendant, payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by Nodin to pay the sum of £300 and interest at 5 per cent. Several half yearly payments of £7 10*s.* each, for interest, having been made by Nodin : *held*, in an action against the defendant upon the note, that such payments by Nodin kept all the securities alive, and prevented the operation of the statute of limitations as to the note.

(*a*) Goddard *v.* Ingram, 3 Q. B. 839. In this case the debt was originally contracted with J. W. and S.; and S. more than six years afterwards, and within six years of the action being brought, made a payment in respect of it to the plaintiff. S. became bankrupt shortly after; and the jury found that he made the payment in fraud of J. and W., and in expectation of immediate bankruptcy. *Held*, nevertheless, that the payment barred the operation of the statute.

(*b*) Coit *v.* Tracy, 8 Conn. 268. In this case there was a joint indebtedness, by the defendant and one Coit, to the plaintiff, growing out of an agency conducted by the defendant and Coit jointly; and more than twenty years after such agency was ended, Coit made an acknowledgment of the debt, and then, at his own expense, and with a view to obtain an advantage to himself, by a recovery against the defendant, procured a suit to be brought, in the name of the plaintiff, against the defendant and himself; and it was *held*, that the acknowledgment of Coit, under such circumstances, was not sufficient to remove the bar of the statute of limitations, set up by the defendant.

(*c*) Bell *v.* Morrison, 1 Pet. 351; Van Keuren *v.* Parmelee, 2 Comst. 523. And see other cases cited *supra*, n. (*v*).

benefit of the statute, so as to be chargeable by reason only of any written acknowledgment or promise, made and signed by any co-contractor. (*d*) But in order to preserve unimpaired the remedy against the joint debtor who makes the promise or acknowledgment, the act provides that in actions to be commenced against two or more joint contractors, if it shall appear that the plaintiff, though barred by the statute as to one or more of such joint contractors, is entitled to recover against another, or others of them, by virtue of a new acknowledgment, or promise, "judgment may be given, and costs allowed, for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

Formerly, the acknowledgment might be made to any one, as it had the full force of an admission of a fact. (*e*) Thus, if A said to B, "I cannot pay you, for I owe C, and must pay him first," this, in an action brought by C against A, to which the statute was pleaded, supported a replication that the cause of action accrued within six years. (*f*) But such doctrine would not be generally maintained now; (*g*) and it has been supposed that Lord *Tenterden's* Act, by implication, required that the acknowledgment should be *to* the creditor himself. (*h*) But this cannot be the legitimate effect of the statute, if, as has been said, and would seem to be deducible from the words of the statute, its purpose is merely to substitute "the certain evidence of a writing, signed by the party chargeable, for the insecure and precarious testimony to be derived from the memory of

(*d*) There is a similar statutory provision in Massachusetts. See Mass. Rev. Stats. c. 120, § 18; Pierce *v.* Tobey, 5 Met. 168; Balcom *v.* Richards, 6 Cush. 360. And in Maine. See Maine Rev. Stats. c. 146, § 24; Quimby *v.* Putnam, 28 Me. 419. And perhaps in some other States.

(*e*) Mountstephen *v.* Brooke, 3 B. & Ald. 141; Peters *v.* Brown, 4 Esp. 46; Halliday *v.* Ward, 3 Camp. 32; Clark *v.* Hougham, 2 B. & C. 149; Soulden *v.* Van Rensselaer, 9 Wend. 293; Whitney *v.* Bigelow, 4 Pick. 110; St. John *v.* Garrow, 4 Port. (Ala.), 223; Oliver *v.* Gray, 1 Harris & G. 204; Watkins *v.* Stevens, 4 Barb. 168; Carshore *v.* Huyck, 6 id. 583; Bloodgood *v.* Bruen, 4 Sandf. 427.

(*f*) Peters *v.* Brown, 4 Esp. 46.

(*g*) It is now clearly established law, in Pennsylvania, that a new promise or acknowledgment, to take a case out of the statute of limitations, must be made to the creditor or his authorized agent. See Farmers & Mechanics Bank *v.* Wilson, 10 Watts, 261; Morgan *v.* Walton, 4 Penn. St. 323; Christy *v.* Flemington, 10 id. 129; Kyle *v.* Wells, 17 id. 286; Gillingham *v.* Gillingham, id. 302. But see the recent New York cases, cited in the preceding note, which show that the old rule is still adhered to in that State.

(*h*) Grenfell *v.* Girdlestone, 2 Younge & C. 662.

witnesses.' (*i*) For then, a writing so signed, should have the whole force of an acknowledgment proved by witnesses before the statute. Perhaps it might be admitted, from the peculiar nature of negotiable paper, that an acknowledgment by the maker to the payee, would remove the bar of the statute, in favor of a subsequent party to the note. This, however, is not quite certain on the authorities. (*j*) There seems to be no reason why a part payment or acknowledgment to an agent, should not relieve a debt from the statute as to his principal; (*k*) or that one to an administrator should not defeat the statute as to his claim in behalf of the intestate's estate. (*l*)

SECTION V.

OF ACCOUNTS BETWEEN MERCHANTS.

The statute of James applies to "all actions of account, and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants." And similar language, or a similar provision, is frequently found in the statute of limitations of this country.

When an action is brought to which the statute of limitations is pleaded in bar, and the question arises whether this exception can be replied, so as to remove the bar, it is necessary to inquire, 1st, whether the transaction upon which the action is founded, constitutes an "account" within the meaning of the exception; and, 2d, whether the account is one which concerns "the trade of merchandise, between merchant and merchant, their factors or servants," within the meaning of the exception. And unless both of these questions can be answered in the affirmative, the statute will apply. In regard to the first of these questions, it is settled in England, by recent cases, that a transaction will

(*i*) Per *Tindal*, C. J., in Haydon *v.* Williams, 7 Bing. 166.

(*j*) See Gale *v.* Capern, 1 A. &. E. 102; Cripps *v.* Davis, 12 M. & W. 159; Bird *v.* Adams, 7 Ga. 505; Dean *v.* Hewit, 5 Wend. 257; Little *v.* Blunt, 9 Pick. 488; Howe *v.* Thompson, 2 Fairf. 152.

(*k*) Megginson *v.* Harper, 2 Cromp. & M. 322; Hill *v.* Kendall, 25 Vt. 528.

(*l*) Baxter *v.* Penniman, 8 Mass. 133; Jones *v.* Moore, 5 Binn. 573.

not constitute an "account" within the meaning of this exception, unless it is such that it would sustain an action of account, or an action on the case for not accounting. (n) This doctrine

(n) Inglis v. Haigh, 8 M. & W. 769. This was an action of indebitatus assumpsit, in which the plaintiff declared for work and labor, money lent, money paid, and for interest. The defendant pleaded the statute of limitations. The plaintiff replied, that he and the defendant were both merchants, and that the cause of action stated in the declaration arose in a course of dealing, carried on between the plaintiff and defendant, as merchant and merchant, and consisted of items in an open and unsettled account between them, as such merchants; and which said account contained various items in favor of the defendant, and the balance due on which he, the plaintiff, sought to recover in the present action. The question was, whether this replication was a sufficient answer to the plea. And the court held that it was not. *Parke*, B., in delivering the judgment of the court, said: "The plea of the statute of limitations is a complete bar, unless the plaintiff, by his replication, can take the case out of its operation. He attempts to do so by bringing it within the exception in the statute, as to merchants' accounts. But we think that exception does not apply to an action of indebitatus assumpsit, for the several items of which the account is composed, or for the general balance; but only to a proper action of account, or perhaps also an action on the case for not accounting. Although there is no reported case expressly governing the present, yet there are many coming very near it, and in which the *dicta* of very eminent judges fully warrant the view we take of the subject." [His Lordship then proceeded to examine the cases.] "In none of these did the facts necessarily call for a decision whether the exception did or did not at all apply to actions of assumpsit. Still the dicta of the judges in those cases are entitled to great weight, unopposed as they are by any conflicting authority whatever. But independently of authority, we are of opinion that the reasonable construction of the statute requires such a restriction as the dicta of the judges, in the cases we have referred to, clearly sanction. The words are, 'all actions of account, and upon the case, other than such *accounts* as concern the trade of merchandise, between merchant and merchant, their factors or servants.' Now, as was said by *Scroggs*, J., in the case of Farrington v. Lee, 1 Mod. 269, 2 id. 311, if the legislature had meant to include in the exception other actions than actions of account, the language would probably have been, 'other than such *actions* as concern the trade of merchandise,' and not 'other than such accounts.' Indeed, it is difficult to say that an action of indebitatus assumpsit, for goods sold and delivered, or for money had and received, can, under any circumstances, be described as an action having any reference to *accounts;* it would have been still more difficult to say so at the time when the statute of limitations was passed, where a merchant plaintiff brings an action for goods sold and delivered, money paid, or any of the other items which may constitute his demand against the merchant defendant, with whom he has had mutual dealings, he is rather repudiating than enforcing *accounts.* Indeed, by the comparatively modern statutes of set-off, the defendant may now have the benefit of his counter demands; but that was not the case at the date of the statute of limitations; and we must construe the statute now, as it ought to have been construed immediately after it became law. At that time there was no proceeding at law by which mutual demands could be set against each other, except by action of account, and consequently, there was no other action in any manner connected with accounts, properly so called. It does not at all vary the case, that the plaintiff only seeks to recover what he calls the *balance* due on the account. If that balance had been stated and agreed to, then all the authorities show that it is altogether out of the exception. If it has not been stated and agreed to, then it is only what the plaintiff chooses to call a balance, the accuracy of which the defendant had, at the time of passing the statute of limitations, no means of disputing, in an action of assumpsit. Our view of the case is much assisted by considering that the exception clearly would not apply to an action of *debt*, brought for the very same demand; and it is difficult to believe that the legislature could have intended to preserve the right in one form of action, but to bar it in

appears to rest upon very satisfactory grounds, and we think it will be adopted by the courts in this country. As to the second question, there seems to be no test by which it can be determined, other than that furnished by the language of the statute. In applying this language, however, to the facts of particular cases, much aid may be derived from the cases already decided. (*o*) An opinion seems formerly to have been enter-

another." About a year afterwards, the case of Cottam *v.* Partridge, 4 Scott, N. R. 819, was decided in the Common Pleas. That was an action of assumpsit, for goods sold and delivered. It appeared that the plaintiffs were iron-founders, and wholesale and retail manufacturing smiths, and agricultural implement makers. The defendant carried on the business of a retail ironmonger. The action was brought to recover the balance of an account, for goods sold and delivered by the plaintiffs to the defendant, between the month of June, 1830, and June, 1834. *Held*, that the case was not within the exception in the statute of limitations, as to merchants' accounts. And *Tindall*, C. J., said: "In the late case of Inglis *v.* Haigh, 8 M. & W. 769, the Court of Exchequer seem to have decided that the exception, as to merchants' accounts, in the statute of limitations, applies only to *an action of account*, or perhaps also to *an action on the case for not accounting*, but not to an action of indebitatus assumpsit. Without going quite so far as that (though I by no means intend to impeach the propriety of that decision), I am of opinion that the exception will not apply, except where an action of account is maintainable; and the ground upon which I rest the determination of the present case is, that the circumstances are not such for which an action of account would lie." The earlier cases will be found fully collected in a learned note to Webber *v.* Tivill, 2 Saund. 121, by Serjeant Williams. And see Spring *v.* Gray, 5 Mason, 505, 6 Pet. 151. In this case, *Marshall*, C. J., after quoting the language of the statute, says: "From the associations of actions on the case, a remedy given by the law for almost every claim for money, and for the redress of every breach of contract not under seal, with actions of account, which lie only in a few special cases; it may reasonably be conceived that the legislature had in contemplation to except those actions only for which account would lie. Be this as it may, the words certainly require that the action should be founded on account." See also, Toland *v.* Sprague, 12 Pet. 300; Didier *v.* Davidson, 2 Barb. Ch. 477.

(*o*) Where the joint owners of plantations in Java, which they worked in copartnership, kept an account with certain merchants and agents at *Bombay*, to whom they became largely indebted in respect of moneys advanced and paid for their use; it was held, that the account was not a mercantile account, within the meaning of the exception in the statute of limitations. Forbes *v.* Skelton, 8 Simons, 335. And in Spring *v.* Gray, 5 Mason, 505, 6 Pet. 151, it was *held*, that a special contract between ship-owners and a shipper of goods, to receive half profits in lieu of *freight* on the shipment for a foreign voyage, was not a case of merchants' accounts, within the exception in the statute of limitations. And *Marshall*, C. J., said: "The account must be 'one which concerns the trade of merchandise.' The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them; but it must concern the trade of the merchandise. It is not an exemption from the act, attached to the merchant merely as a personal privilege, but an exemption which is conferred on the business, as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be, not an ordinary traffic between a merchant and any ordinary customers, but between merchant and merchant." In Watson *v.* Lyle, 4 Leigh, 236, where the plaintiff replied to a plea of the statute of limitations, that the cause of action consisted of accounts, which concerned the trade of merchandise, between merchant and merchant, and no evidence was adduced to prove that either party was a merchant during the time of the dealings between them, nor any evidence of the character of those dealings but that furnished by the account of the plaintiff, in

tained, that none were merchants, within the meaning of this exception, save those who traded beyond sea. (*p*) But that clearly would not be held now. So, also, an opinion has prevailed, to some extent, that the exception does not extend to accounts between merchants, as partners; (*q*) but we doubt whether there is good reason for such restriction. (*r*) Whether common retail tradesmen come within the exception, as being merchants, is more uncertain. (*s*)

It has been much questioned whether this exception required, that even where the account was between merchants, and in relation to merchandise, some item of it must be within six years. (*t*) It would seem that this construction *adds* to the statute. It requires, for admission within the exception, a new, distinct, and important element, which the statute certainly does not express, and, perhaps, does not indicate. We consider this

which accounts the debits to the alleged debtor consisted of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other items for cash advanced to or for him, and there was a single credit for the proceeds of a bill of exchange bought of him; it was *held*, that the replication was not supported by the evidence, and the demand therefore was barred by the statute. Again, in Farmers & Mechanics Bank *v.* Planters Bank, 10 Gill & J. 422, it was *held*, that the exception did not apply to transactions between banking institutions. And see further, Dutton *v.* Hutchinson, 1 Jur. 772; Coster *v.* Murray, 5 Johns. Ch. 522, 20 Johns. 576; Landsdale *v.* Brashear, 3 T. B. Mon. 330; Patterson *v.* Brown, 6 id. 10; Smith *v.* Dawson, 10 B. Mon. 112; Price *v.* Upshaw, 2 Humph. 142; Slocumb *v.* Holmes, 1 How. (Miss.), 139; Fox *v.* Fisk, 6 id. 328; Marseilles *v.* Kenton, 17 Penn. St. 238; McCulloch *v.* Judd, 20 Ala. 703; Blair *v.* Drew, 6 N. H. 235; Sturt *v.* Mellish, 2 Atk. 612; Codman *v.* Rogers, 10 Pick. 118; Coalter *v.* Coalter, 1 Rob. (Va.), 79.

(*p*) Thus, in Sherman *v.* Withers, 1 Ch. Cas. 152, which was a bill of equity for an account of fourteen years' standing, it appeared that the plaintiff was an inland merchant, and the defendant his factor. The defendant pleaded the statute of limitations. And "upon debate of the plea, the Lord Keeper conceived the exception in the statute, as to merchants' accounts, did not extend to this case, but only to merchants trading beyond sea." And see Thomson *v.* Hopper, 1 Watts & S. 469.

(*q*) Bridges *v.* Mitchell, Bunb. 217; Lansdale *v.* Brashear, 3 T. B. Mon. 330; Patterson *v.* Brown, 6 id. 10; Coalter *v.* Coalter, 1 Rob. (Va.), 79.

(*r*) See Ogden *v.* Astor, 4 Sandf. 327.

(*s*) In Farrington *v.* Lee, 1 Mod. 268, *Atkyns*, J., said: "I think the makers of this statute had a greater regard to the persons of merchants, than the causes of action between them. And the reason was, because they are often out of the realm, and cannot always prosecute their actions in due time. I think, also, that no other sort of tradesmen but merchants are within the benefit of this exception; and that it does not extend to shopkeepers, they not being within the same mis chief." And see Cottam *v.* Partridge, 4 Scott, N. R. 819, where this question was raised, but not decided.

(*t*) For cases holding the affirmative of this question, see Welford *v.* Liddel, 2 Ves. Sen. 400; Martin *v.* Heathcote, 2 Eden, 169; Barber *v.* Barber, 18 Ves. 286; Foster *v.* Hodgson, 19 id. 180; Ault *v.* Goodrich, 4 Russ. 430; Coster *v.* Murray, 5 Johns. Ch. 522, 20 Johns. 576; Didier *v.* Davidson, 2 Barb. Ch. 477; Van Rhyn *v.* Vincent, 1 McCord, Ch. 310. And see Penn *v.* Watson, 20 Mo. 13

question as now settled in England, in the negative; and believe that it will be so held in this country. (*u*)

SECTION VI.

WHEN THE PERIOD OF LIMITATION BEGINS TO RUN.

The next question we propose to consider is, from what point of time the six years are to be counted. The general answer is, from the period when the creditor could have commenced his action; because it is then only that the reason of the limitation begins to operate, whether we say, with the theory that the statute is one of presumption, that so long a delay makes it probable that the debt is paid, or suppose the statute to be one of repose, and say, that after so long a neglect, the creditor ought to lose his action. Thus, if a credit is given, the six years begin when the credit expires; (*v*) and if the money be payable on the happening of a certain event, the six years begin from the happening of the event, as on a marriage; (*w*) or if a bill be payable at sight, the six years begin on presentment and demand. (*x*) And this credit may be inferred, or lengthened by inference. (*y*) As if goods are sold on six months

(*u*) That this question is now settled in the negative in England, see Catling *v.* Skoulding, 6 T. R. 189; Robinson *v.* Alexander, 8 Bligh, 352; Inglis *v.* Haigh, 8 M. & W. 769. See, however, Tatam *v.* Williams, 3 Hare, 347. And such also is the weight of authority in this country. See Mandeville *v.* Wilson, 5 Cranch, 15; Spring *v.* Gray, 6 Pet. 151; Bass *v.* Bass, 6 Pick. 362; Watson *v.* Lyle, 4 Leigh, 236; Coalter *v.* Coalter, 1 Rob. (Va.), 79; Lansdale *v.* Brashear, 3 T. B. Mon. 330; Patterson *v.* Brown, 6 id. 10; Dyott *v.* Letcher, 6 J. J. Marsh. 541; Guichard *v.* Superveile, 11 Texas, 522; Pridgen *v.* Hill, 12 id. 374; Ogden *v.* Astor, 4 Sandf. 329. And see Chambers *v.* Snooks, 25 Penn. St. 296.

(*v*) Thus, in Wittersheim *v.* Lady Carlisle, 1 H. Bl. 631, it was *held*, that where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer, at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money was to be repaid, namely, when the bill became due. And see Wheatley *v.* Williams, 1 M. & W. 533; Irving *v.* Veitch, 3 id. 90; Fryer *v.* Roe, 12 C. B. 437, 22 Eng. L. & Eq. 440; Tisdale *v.* Mitchell, 12 Texas, 68.

(*w*) Shutford *v.* Borough, Godb. 437; Fenton *v.* Emblers, 1 W. Bl. 353.

(*x*) Wolfe *v.* Whiteman, 4 Harring. (Del.), 246; Holmes *v.* Kerrison, 2 Taunt. 323.

(*y*) See Brent *v.* Cook, 12 B. Mon 267.

credit, and then a bill is to be given, payable at three months, whether the bill is given or not, the six years are said to begin after nine months; and if the bill may be at two or four months, at the purchaser's option, this, it seems, would be construed as a credit for ten months. (*z*) It may, however, be doubted whether the true construction of such a contract should not be a credit for six months; then a bill for two or four; and if the bill is given, the statute will begin to run when the bill is due and not before; but if the bill is not given, this is a breach of the contract so far, and the credit ends with the six months, and the statute then begins to run. (*a*)

Where there are third parties in the transaction, the same rule prevails. As if one sells property belonging to himself and another, and this other sues him for his share, the action is barred by the statute, only if six years have run from the time when the payment was made by the buyer. (*b*) And if the seller takes a promissory note for the goods, the six years do not run for him from the sale, nor yet from the maturity of the note; but only from the actual payment, because only then could the other owner demand his share. (*c*) So if a surety pays for his principal, the statute begins to run from his first payment for his principal, as to that payment; (*d*) but as to his claim on a co-surety, for contribution, it does not begin when he begins to pay, but only when his payments first amount to more than his share. (*e*) So in a contract of indemnity; the six years begin only with the actual damnification. (*f*) As if one lends a note, on a promise of indemnity, the statute begins to run only from the time when he has to pay the note he lends. (*g*) If a demand be necessary to sustain an action, only after it is made does the statute begin. (*h*) But a note payable

(*z*) Helps *v.* Winterbottom, 2 B. & Ad. 431.

(*a*) Per *Parke*, J., in Helps *v.* Winterbottom, *supra.*

(*b*) Miller *v.* Miller, 7 Pick. 133.

(*c*) Id.

(*d*) Davies *v.* Humphreys, 6 M. & W. 153; Ponder *v.* Carter, 12 Ired. 242; Gillespie *v.* Creswell, 12 Gill & J. 36; Bullock *v.* Campbell, 9 Gill, 182.

(*e*) Davies *v.* Humphreys, *supra*

(*f*) Huntley *v.* Sanderson, 1 Cromp. & M. 467; Collinge *v.* Heywood, 9 A. & E. 633; Ponder *v.* Carter, 12 Ired. 242; Sims *v.* Gondelock, 6 Rich. 100; Gillespie *v.* Creswell, 12 Gill &. J. 36; Scott *v.* Nichols, 27 Miss. 94.

(*g*) Reynolds *v.* Doyle, 2 Scott, N. R. 45.

(*h*) For the cases in which a demand is necessary, see Topham *v* Braddick, 1 Taunt. 572; Clark *v.* Moody, 17 Mass. 145; Coffin *v.* Coffin, 7 Greenl. 298; Lit-

"on demand" is due always, and the statute begins as soon as the note is made.(*i*) So it is with a receipt for money borrowed, whereby the borrower agrees to pay "whenever called upon to do so." (*j*)

The statute begins to run whenever the creditor or plaintiff *could* bring his action, and not when he knew he could; thus, it is said that if one promises to pay when able, as soon as he is able the statute runs, although the creditor did not know it. (*k*) And if the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury result from the breach until afterwards. (*l*) As if one delivers goods which are not what he undertakes to sell, and the purchaser resells under his mistake, and is obliged to pay damages, he has a claim against the first seller, but must bring his action to enforce it within six years from the first sale. (*m*) So if one is guilty of gross negligence, whereby injury occurs, six years, running from the time of his neglect, will bar the action, although the injury has occurred within the six. (*n*)

The holder of a foreign bill acquires a right of action; as against the drawer, immediately on non-acceptance, protest, and notice; and the statute then begins to run against him;

tle *v.* Blunt, 9 Pick. 488; Stafford *v.* Richardson, 15 Wend. 302; Lillie *v.* Hoyt, 5 Hill, 395; Hickok *v.* Hickok, 13 Barb. 632; Lyle *v.* Murray, 4 Sandf. 590; Mitchell *v.* McLemore, 9 Texas, 151; McDonnell *v.* Branch Bank, 20 Ala. 313; Taylor *v.* Spear, 3 Eng. 429; Denton *v.* Embury, 5 id. 228.

(*i*) Little *v.* Blunt, 9 Pick. 488; Wenman *v.* The Mohawk Ins. Co. 13 Wend. 267; Hill *v.* Henry, 17 Ohio, 9; Norton *v.* Ellam, 2 M. & W. 461.

(*j*) See Waters *v.* The Earl of Thanet, 2 Q. B. 757.

(*k*) Waters *v.* The Earl of Thanet, 2 Q. B. 757. And see Battley *v.* Faulkner, 3 B. & Ald. 288; Short *v.* M'Carthy, id. 626; Brown *v.* Howard, 2 Brod. & B. 73; Granger *v.* George, 5 B. & C. 149; Argall *v.* Bryant, 1 Sandf. 98; Troup *v.* Smith, 20 Johns. 33; Howell *v.* Young, 5 B. & C. 259; Wilcox *v.* Plummer, 4 Pet. 172; Kerns *v* Schoonmaker, 4 Ohio, 331; Denton *v.* Embury, 5 Eng. 228; The Governor *v.* Gordon, 15 Ala. 72.

(*l*) Argall *v.* Bryant, 1 Sandf. 98; Smith *v.* Fox, 6 Hare, 386. And see cases cited in preceding note.

(*m*) Thus where A, under a contract to deliver spring-wheat, had delivered to B winter-wheat, and B, having again sold the same as spring-wheat, had, in consequence, been compelled, after a suit in *Scotland*, which lasted many years, to pay damages to the vendee, and afterwards brought an action of assumpsit against A for his breach of contract, alleging as special damage, the damages, so recovered, it was *held*, that although such special damage had occurred within six years before the commencement of the action by B against A, yet that the breach of the contract having occurred more than six years before that period, A might properly plead *actio non accrevit infra sex annos.* Battley *v.* Faulkner, 3 B. & Ald. 289.

(*n*) Sinclair *v.* The Bank of So. Car. 2 Strobh. 344. And see cases cited *supra*, n. (*i*).

and therefore, if he afterwards pay the bill when due, he has not six years from that payment in which he may bring his action. (*o*) It has been said, *obiter*, in New York, that a second indorser who sues a prior indorser for money paid on a note, but who has not paid the note and brought his action upon it, cannot maintain his action, if the statute has run in favor of the defendant, and against the holder of the note. (*p*)

If money be payable by instalments, the statute begins to run as to each instalment from the time when it becomes due; but if there be an agreement, that upon default as to any one, all then unpaid shall become payable, the statute begins to run as to all, upon any default. (*q*)

If the demand arise from the imperfect execution of a contract to do certain work, in a certain way, and within a certain time, it is said that the six years begin to run from the time when the work was to have been completed, and not from the time when the plaintiff had received actual damage from the imperfect execution of the work. (*r*)

It would seem, both from English and American authority, that the statute does not begin to run against the claim of an attorney, for professional services, until he no longer acts in that matter as attorney; (*s*) but he may terminate his professional relation at his own pleasure (if he thereby does no wrong to his client), and demand payment of his bill; and the statute then begins to run. (*t*) So it would undoubtedly be, if the services were in any way brought to an end, although no demand were made; because (except that, in England, the rule requiring a delivery of the signed bill one month before suit, might prevent it) he could bring an action for his services at once.

(*o*) Whitehead *v.* Walker, 9 M. & W. 506.

(*p*) Wright *v.* Butler, 6 Wend. 284. And see Barker *v.* Cassidy, 16 Barb. 177.

(*q*) Hemp *v.* Garland, 4 Q. B. 519.

(*r*) Rankin *v.* Woodworth, 3 Penn. 48.

(*s*) Harris *v.* Osbourn, 2 Cromp. & M. 629; Nicholls *v.* Wilson, 11 M. & W. 106; Whitehead *v.* Lord, 7 Exch. 691, 11 Eng. L. & Eq. 587; Rothery *v.* Munnings, 1 B. & Ad. 15; Phillips *v.* Broadley, 9 Q. B. 744; Foster *v.* Jack, 1 Watts, 334; Jones *v.* Lewis, 11 Texas, 359.

(*t*) Vansandau *v.* Browne, 9 Bing. 402

SECTION VII.

OF THE STATUTE EXCEPTIONS AND DISABILITIES.

The statute of James provides, that if the plaintiff, at the time when the cause of action accrues, is within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, he may bring his action at any time within six years after the disability ceases or is removed.

If, therefore, either of these disabilities exist, when the cause of action arises, then, so long as it exists, the statute does not run; but as soon as the disability is removed, the statute begins to run. (*u*)

In general, if the statute begins to run, its operation cannot afterwards be arrested. (*v*) Thus, if the disability should not exist when the cause of action arose, but should begin one month afterwards, and remain, as if the creditor should go abroad and not return, the statute runs in the same way as if the disability never existed. So if it exists when the cause of action begins, and is afterwards removed, although temporarily, the statute begins to run as soon as the disability is removed, and then continues. And it has been held, not only that if the creditor returns to his home for a short time, and then goes abroad again, and remains there, the statute begins to operate; but if there be joint creditors, who were abroad when the cause of action accrued, and one of them returned home, the six years begin as to all from such return. (*w*)

If several disabilities coexist when the right of action ac-

(*u*) An acknowledgment by an infant of a debt due for necessaries is effective, for the purpose of taking the debt out of the operation of the statute. Williams *v.* Smith, 4 Ellis & B. 180, 28 Eng. L. & Eq. 276.

(*v*) Smith *v.* Hill, 1 Wilson, 134; Gray *v.* Mendez, Stra. 556; Ruff *v.* Bull, 7 Harris & J. 14; Young *v.* Mackall, 4 Md. 362; Coventry *v.* Atherton, 9 Ohio, 34; Pendergrast *v.* Foley, 8 Ga. 1; Stewart *v.* Spedden, 5 Md. 433.

(*w*) Perry *v.* Jackson, 4 T. R. 516; Marsteller *v.* M'Clean, 7 Cranch, 156; Henry *v.* Means, 2 Hill (S. C.), 328; Riggs *v.* Dooley, 7 B. Mon. 236; Wells *v.* Ragland, 1 Swan, 501. But see *contra*, Gourdine *v.* Graham, 1 Brev. 329.

crues, the statute does not begin to run until all are removed. (x) But if there exists but one disability at the time when the cause of action accrues, other disabilities, arising afterwards, cannot be tacked to the first, so as to extend the time of limitation. (y)

But it is obvious that an action cannot be brought if the defendant cannot be reached, any more than if the plaintiff cannot act. And therefore, the statute of the fourth of Anne, ch. 16, s. 19, provides, that if any person against whom there shall be a cause of action, shall, at the time when such cause of action accrues, be beyond the seas, then the action may be brought at any time within six years after his return. This statute also has been substantially reënacted here. In England it seems to have been held, that if the debtor returns but for a few days, and his return is wholly unknown to the creditor, the statute begins to run from the date of his return. (z) But it has been held here, that if the debtor comes back within the jurisdiction, and remain some weeks, but hide himself, so that the creditor has not actually an opportunity of suing him, this return does not satisfy the purpose of the statute, and the six years do not begin. (a) It has further been held here, that in

(x) Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Jackson *v.* Johnson, 5 Cowen, 74; Butler *v.* Howe, 13 Me. 397; Dugan *v.* Gittings, 3 Gill, 138; Scott *v.* Haddock, 11 Ga. 258.

(y) Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Jackson *v.* Wheat, 18 Johns. 40; Eager *v.* The Commonwealth, 4 Mass. 182; Dease *v.* Jones, 23 Miss. 133; Doe *d.* Caldwell *v.* Thorp, 8 Ala. 253; Mercer *v.* Selden, 1 How. 37; Bradstreet *v.* Clarke, 12 Wend. 602; Scott *v.* Haddock, 11 Ga. 258.

(z) See Gregory *v.* Hurrill, 5 B. & C. 341; Holl *v.* Hadley, 2 A. & E. 758.

(a) White *v.* Bailey, 3 Mass. 271. So the Supreme Court of New York in Fowler *v.* Hunt, 10 Johns. 464, declared that, "The coming from abroad must not be clandestine, and with an intent to defraud the creditor by setting the statute in operation and then departing. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor." So in Hysinger *v.* Baltzells, 3 Gill & J. 158, where the cause of action accrued in October, 1822, when the defendant was a resident of another State, and it appeared that the defendant was in *Baltimore*, where the plaintiff resided, in April, 1823, "pur chased other goods from the plaintiff, and remained there for two days," it was *held*, that the statute did not begin to run, because it did not appear at what time during those two days the defendant made his purchase; nor whether the plaintiff had an opportunity to sue out a writ against him with effect. And *Martin*, J., said: "It might be true the defendant was in *Baltimore* for two days, and that he purchased goods from the plaintiffs, yet if their knowledge of his being there arose *solely* from the purchase made, and that purchase was made *immediately* before the defendant left the city, that would not afford them an opportunity to sue out a writ with effect. If it had been stated, that the defendant was in *Baltimore* for two days, and that the plaintiffs knew he was there for *that space of time, laches* might be imputed to them; but this is not stated, and the court could not infer it." And see further, State Bank *v.* Seawell, 18 Ala. 616; Byrne *v.* Crowninshield, 1

order to put the statute in operation, the defendant is bound to show, either that the plaintiff knew of his return, so as to have had an opportunity to arrest him, or that his return was so public as to amount to constructive notice or knowledge, and to raise the presumption that if the plaintiff had used ordinary diligence, the defendant might have been arrested. (*b*)

A question has been made, whether the exception in the statute, in reference to absentees, extends to foreigners, or those who have resided altogether out of the State or country, as well as to citizens who may be absent for a time. And it has been contended that the word "return" required that the exception should be confined to the latter class. But the contrary is well settled both here and in England. (*c*) And it seems that this exception to the statute of limitations applies to foreigners, even where they have an agent residing in the State where the suit is brought. (*d*) Where the debtor is a resident of the State or

Pick. 263; Howell *v.* Burnet, 11 Ga. 303; Alexander *v.* Burnet, 5 Rich. 189; Dorr *v.* Swartwout, 1 Blatchf. C. C. 179; Randall *v.* Wilkins, 4 Denio, 577.

(*b*) Little *v.* Blunt, 16 Pick. 359. In Mazozon *v.* Foot, 1 Aikens, 282, *Skinner*, C. J., said: "It cannot be supposed, nor does the defendant insist, that every coming or return into the State, would set the statute in operation. He admits it must be such, as that by due diligence the creditor might cause an arrest. If the debtor should remove or return to the State publicly, and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence, or that of the creditor, this would undoubtedly bring the case, by a correct construction of the statute, within its operation, though the creditor should have no knowledge of his return. So, too, if the debtor, having no intention to reside here, comes or returns into the State, and this is known to the creditor, and he has an opportunity to arrest the body, the case is brought within the statute. In the latter case, it is necessary the creditor should be apprised of his debtor's being within the jurisdiction of the State." And see Hill *v.* Bellows, 15 Vt. 727; Didier *v.* Davison, 2 Sandf. Ch. 61. See also, Cole *v.* Jessup, 10 N. Y. (6 Seld.), 96. But see *contra*, State Bank *v.* Seawell, 18 Ala. 616.

(*c*) Thus, in Ruggles *v.* Keeler, 3 Johns. 261, *Kent*, C. J. said: "Whether the defendant be a resident of this State, and only absent for a time, or whether he resides altogether out of the State, is immaterial. He is equally within the proviso. If the cause of action arose out of the State, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction. This has been the uniform construction of the *English* statutes, which also speak of the *return* from beyond seas of the party so absent. The word *return* has never been construed to confine the proviso to *Englishmen*, who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad." And see, to the same effect, Strithorst *v.* Graeme, 3 Wilson, 145, 2 W. Bl. 723; Lafonde *v.* Ruddock, 13 C. B. 839, 24 Eng. L. & Eq. 239; King *v.* Lane, 7 Mo. 241; Tagart *v.* The State of Indiana, 15 id. 209; Alexander *v.* Burnet, 5 Rich. 189; Estis *v.* Rawlins, 5 How. Miss. 258; Hall *v.* Little, 14 Mass. 203; Dunning *v.* Chamberlin, 6 Vt. 127; Graves *v.* Weeks, 19 id. 178; Chomqua *v.* Mason, 1 Gallis. 342. But see *contra*, Snoddy *v.* Cage, 5 Texas, 106; Moore *v.* Hendrick, 8 id. 253.

(*d*) Wilson *v.* Appleton, 17 Mass. 180

country at the time the cause of action accrues and until his death, the statute of limitations commences running only from the time of granting letters of administration on his estate. (*e*) It has recently been held in New York, by the Court of Appeals, that a foreign corporation sued in that State, cannot avail itself of the statute of limitations. It is like a natural person within the exceptions to the operation of the statute, by which the time of absence from the State is not to be taken as any part of the time limited for the commencement of an action against it. (*f*) In California, where a judgment was obtained against an intestate in his lifetime, and no execution levied, it was held, "that the judgment creditor being prevented by the statute from suing after the death of the debtor, the statute ceased to run until presentation of the claim to the administrator." (*g*)

In New England, where attachment by mesne process prevailed, it was formerly very generally provided, that if the defendant had left property within the State, this clause did not operate, because the action could be begun and kept alive by attachment. And under this provision it was held, that real estate was such property, and prevented the operation of this section, although under attachment for more than its value. (*h*) Because the action could still be kept alive, and perhaps the first attachment might be defeated. But this clause, respecting property, is now, in some cases, omitted. (*i*) It is, however, sometimes provided, that if, after the action accrues, the defendant shall be absent from, and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action. Under this clause the

(*e*) Benjamin *v.* De Groot, 1 Denio, 151; Christophers *v.* Garr, 2 Seld. 61; Davis *v.* Garr, id. 124; Douglas *v.* Forrest, 4 Bing. 686.

(*f*) Olcott *v.* The Tioga Railroad Company. The case of Faulkner *v.* Delaware and Hudson Canal Company, 1 Denio, 141, was overruled. The action was against a corporation created by and existing under the laws of Pennsylvania, upon a bill of exchange drawn by it in payment for a locomotive engine, and protested May 21, 1842. The statute of limitations was pleaded, and the referee to whom the action was referred held, that the action was barred by the statute, and nonsuited the plaintiff. The general term of the Supreme Court affirmed this judgment. But upon appeal to the Court of Appeals, the judgment of the Supreme Court was reversed, and a new trial ordered.

(*g*) Quincy *v.* Hall, 19 Cal. 97.

(*h*) Byrne *v.* Crowninshield, 1 Pick 263.

(*i*) See Mass. Rev. Stats. c. 120, § 9.

question has arisen whether successive absences can be accumulated, and the aggregate deducted from the time elapsed after the accruing of the cause of action; or whether the statute provides only for a single departure and return, after which it continues to run, notwithstanding any subsequent departure. And this question has been decided differently in different States. (*j*) The question has also arisen, whether this clause contemplates *temporary* absences, or only such as result from a permanent change of *residence*. And upon this question also learned courts have differed. (*k*)

It has been recently held in England, that if there be several defendants, and some of them are abroad, and some at home, the statute does not begin to run in regard to any who are at home, until all are within reach of suit. (*l*) For although, if one of several co-plaintiffs is within seas, the statute runs, because one plaintiff can use the names of the others in his action, it is otherwise as to co-defendants. The plaintiff can sue those only who are within reach; and if compelled to sue them, he may have a judgment against insolvent persons, which satisfies his claim and destroys his remedy against solvent debtors.

The expression "beyond the seas" in the English statute, is repeated in some of the American statutes; and in others, such phrases as "beyond sea," "over the sea," "out of the country," "out of the State," are used in its stead, but for an equivalent purpose. These phrases are generally construed to mean, out of the State or jurisdiction where the case is tried; (*m*) but our

(*j*) In New York it has been *held*, that the statute provides for only a single departure and return. Cole *v.* Jessup, 2 Barb. 309; Dorr *v.* Swartwout, 1 Blatchf. C. C. 179. But the contrary has since been decided in New Hampshire. Gilman *v.* Cutts, 3 Foster, 376. And see Smith *v.* The Heirs of Bond, 8 Ala. 386; Chenot *v.* Lefevre, 3 Gilman, 637.

(*k*) In the case of Gilman *v.* Cutts, *supra*, the Superior Court of New Hampshire *held*, that every absence from the State, whether temporary or otherwise, if it be such that the creditor cannot, during the time of its continuance, make legal service upon the debtor, must be reckoned. And see Vanlandingham *v.* Huston, 4 Gilman, 125. But in Wheeler *v.* Webster 1 E. D. Smith, 1, the Court of Common Pleas for the City and County of New York, held that, in order to interrupt the running of the statute, it is not sufficient to prove that the debtor, after the cause of action accrued, from time to time departed and was repeatedly absent from the State; he must be shown to have departed from, and *resided* out of, the State. Drew *v.* Drew, 37 Me. 389; Varney *v.* Grows, id. 306.

(*l*) Fannin *v.* Anderson, 7 Q. B. 811. And see Townes *v.* Mead, 16 C. B. 123, 29 Eng. L. & Eq. 271.

(*m*) Galusha *v.* Cobleigh, 13 N. H. 79; Field *v.* Dickinson, 3 Pike, 409 Wake-

notes will show that there is much authority for construing any such phrase as meaning beyond the limits of the United States. (*n*)

There is some uncertainty whether it is a good defence at law against the operation of the statute, when an action is grounded upon a fraud committed more than six years before, that it was not discovered until within six years. There is no exception against fraud in the English statute; nor is such an exception generally made in this country. And although, in equity, this would remove the bar of the statute, almost as a matter of course, (*o*) there is some difficulty in giving effect to it at law. Nevertheless, the prevailing rule in this country prevents the six years from beginning to run, even at law, until the fraud is discovered by the plaintiff; (*p*) but our notes will show that there is much diversity in the decisions on this subject.

SECTION VIII.

THAT THE STATUTE AFFECTS THE REMEDY ONLY, AND NOT THE DEBT.

The statute only declares that "no action shall be maintained;" but not that the cause of action is made void. Hence, although the remedy by action is lost, a lien is not lost. If one holds a note against which the statute has run, and also a mort-

field *v.* Smart, 3 Eng. 488; Richardson *v.* Richardson, 6 Ohio, 125; Pancoast *v.* Addison, 1 Harris & J. 350; Forbes *v.* Foot, 2 McCord, 331; Murray *v.* Baker, 3 Wheat. 541; Shelby *v.* Guy, 11 id. 361.

(*n*) Thus, in Pennsylvania, the term "beyond the seas" is construed to mean without the limits of the United States. Thurston *v.* Fisher, 9 S. & R. 288. Also in North Carolina. Whitlocke *v.* Walton, 2 Murphy, 23; Earle *v.* Dickson, 1 Dev. 16. And in Missouri. Marvin *v.* Bates, 13 Mo. 217; Fackler *v.* Fackler, 14 id. 431.

(*o*) Mayne *v.* Griswold, 3 Sandf. 463; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 122; Stocks *v.* Van Leonard, 8 Ga. 511; Charter *v.* Trevelyan, 11 Clark & F. 714; Blair *v.* Bromley, 5 Hare, 542.

(*p*) Such is the doctrine of Sherwood *v.* Sutton, 5 Mason, 143; Conyers *v.* Kenans, 4 Ga. 308; Persons *v.* Jones, 12 id. 371; The First Massachusetts Turnpike Corp. *v.* Field, 3 Mass. 201; Horner *v.* Fish, 1 Pick. 435; Pennock *v.* Freeman, 1 Watts, 401; Harrell *v.* Kelly, 2 McCord, 426. But see *contra*, Troup *v.* Smith, 20 Johns. 33; Leonard *v.* Pitney, 5 Wend. 30; Allen *v.* Mille, 17 id. 202; Smith *v.* Bishop, 9 Vt. 110; Lewis *v.* Houston, 11 Texas, 642; Parham *v* McCravy, 6 Rich. Eq. 140; McLure *v.* Ashby, 7 id. 430. And see the late English case of Imperial Gas Light & Coke Co. *v.* London Gas Light Co. 10 Exch. 39, 26 Eng. L. & Eq. 425, and editor's note.

gage or pledge of real or personal property to secure it, he cannot sue the note, but he can take, or hold possession of the property and sell it, if it be personal, with proper precautions, or have a bill in equity to foreclose his mortgage. And if his lien, whatever it be, fails to pay the whole amount of the note, he loses the remainder, because he can have no action *upon it*, although he may have proper process founded upon the debt and the security, to establish his lien, and make it available in payment of the debt. (*q*) The index of the second volume of Black's Reports, of the Supreme Court of the United States, states, that "The lapse of time under the statute of limitations not only bars the remedy but extinguishes the right." But this is not the language of the court in the case referred to, nor can any such general rule be inferred from the case. It was an action of ejectment brought by appeal from Wisconsin. The defendant (plaintiff in error) relied upon a statute of limitations referring to proceedings for recovery of lands sold for taxes. The court (*Swayne* J.) says: "The lapse of time limited *by such statutes*, not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder." The court then goes on to give the reason for this, by a quotation from Buller's Nisi Prius, sustained by other authorities. The reason given is, that "it tolls the entry of the person having the right, and consequently, though *the very right be in the defendant*, yet he cannot justify his ejecting the plaintiff." It would seem obvious that what the court intend is, that *such a statute* makes the right wholly worthless, because it makes him who holds it, wholly remediless. (*r*) It might be doubted, whether the statute of

(*q*) Spears *v.* Hartley, 3 Esp. 81; Quantock *v.* England, 5 Burr. 2628; Williams *v.* Jones, 13 East, 439; Chapple *v.* Durston, 1 Cromp. & J. 1; Mayor *v.* Pyne, 2 C. & P. 91; Higgins *v.* Scott, 2 B. & Ad. 413; Mayor, &c. of N. Y. *v.* Colgate, 2 Duer, 1, 2 Kern. 140. See Pratt *v.* Huggins, 29 Barb. 277, wherein it was *held*, that a debt secured by a sealed mortgage and an unsealed note instead of a bond, may be enforced by a foreclosure of the mortgage, after the expiration of six, but before the expiration of twenty years from the time when the debt became due. See *contra*, Harris *v.* Mills, 28 Ill. 44, where it is *held*, when the note is barred by the statute of limitations, the right to foreclose is likewise barred; but if the mortgage contains a covenant to pay the money, it may be that the mortgage will only be barred by the time fixed for the limitation in such cases. The early cases of Draper *v.* Glassop, 1 Ld. Raym. 153, and Anonymous, 1 Salk. 278, which were decided upon the ground that the statute of limitations destroyed the debt as well as the remedy, have now no authority.

(*r*) Leffingwell *v* Warren, 2 Black, 599.

Wisconsin referred to, is, strictly speaking, a statute of limitation; it is rather a statute conferring power, than limiting rights which exist without the statute. The right spoken of is rather a power than a right; and as it exists only by force of the statute, when this force ceases to operate, it may be said that the right or power ceases to exist.

CHAPTER VII.

OF INTEREST AND USURY.

Sect. 1.— *Of interest, and when it is recoverable.*

ORIGINALLY, the word usury meant any money received for the use of other money. Whether it were more or less, such taking was thought to be unlawful, or, at least, immoral. In modern times, a moderate payment for the use of money has been held to be lawful; and to this the name of interest is given; or rather, such payment of money for the use of money, whether it be more or less, is now called interest, while the word usury is now confined to the taking of more than the law allows.

Now, and for some generations, the law of England and of this country not only permits parties to bargain for a certain rate of interest, and enforces that bargain, but it makes it for them, in many cases; that is, where it is certain that money ought now to be paid, and ought to have been paid long since, the law, in general, implies conclusively, that, for the delay in the payment of the money, the debtor promised to pay legal interest. (*a*)

This interest is allowed on money withheld, if not on the ground of some promise to pay it, express or implied, then as damages for default, in retaining the money which belongs to another. The contract may be implied from the usage of a place, or of a trade, (*b*) or from the course of dealing between the parties, (*c*) or from the practice of one party, if that be known to the other party. (*d*)

(*a*) Selleck *v.* French, 1 Conn. 32; Reid *v.* Rensselaer Glass Factory, 3 Cowen, 393, 5 id. 587; Dodge *v.* Perkins, 9 Pick. 368. And see Kennedy *v.* Barnwell, 7 Rich. 124.

(*b*) Meech *v.* Smith, 7 Wend. 315; Koons *v.* Miller, 3 Watts & S. 271; Watt *v.* Hoch, 25 Penn. St. 411.

(*c*) Easterly *v.* Cole, 3 Comst. 502, 1 Barb. 235.

(*d*) M'Allister *v.* Reab, 4 Wend. 483, 8 Wend. 109; Easterly *v.* Cole, *supra.*

Among the cases in which interest has been allowed for the detention of a debt, the following may be considered the most important: An action of debt on a judgment, (*e*) or on an account liquidated. (*f*) For goods sold, interest accrues after the day of payment. (*g*) On an unsettled claim, after a demand of payment. (*h*) For rent to be paid at a fixed time, interest is payable from the time the rent becomes due, (*i*) even if it be payable in specific articles. (*j*) For money paid for the use of another, interest is due from the time of payment. (*k*) So it has been held in cases of money lent. (*l*) If the money is due now, but not payable until some act of the promisee, as if payable on demand, then that act must take place before any claim for interest can accrue. (*m*)

The guarantor of a note is liable for interest from the time that he is notified of the default of the principal, (*n*) and perhaps from the date of the default. (*o*)

In England, the weight of authority would seem to establish the rule, that interest should not be added in the amount of

(*e*) Klock *v.* Robinson, 22 Wend. 157; Prescott *v.* Parker, 4 Mass. 170; Gwinn *v.* Whitaker, 1 Harris & J. 754; Hodgdon *v.* Hodgdon, 2 N. H. 169. And see Nelson *v.* Felder, 7 Rich. Eq. 395.

(*f*) Blaney *v.* Hendrick, 3 Wilson, 205; Walden *v.* Sherburne, 15 Johns. 409, 424; Liotard *v.* Graves, 3 Caines, 226, 234; Elliott *v.* Minott, 2 McCord, 125.

(*g*) Crawford *v.* Willing, 4 Dall. 286, 289; Bate *v.* Burr, 4 Harring. (Del.), 130; Porter *v.* Munger, 22 Vt. 191; Easterly *v.* Cole, 3 Comst. 502.

(*h*) McIlvaine *v.* Wilkins, 12 N. H. 474; Gammel *v.* Skinner, 2 Gallis. 45; Barnard *v.* Bartholomew, 22 Pick. 291. See Goff *v.* Rehoboth, 2 Cush. 475; Purdy *v.* Philips, 1 Kern. 406.

(*i*) Clark *v.* Barlow, 4 Johns. 183; Williams *v.* Sherman, 7 Wend. 109; Dennison *v.* Lee, 6 Gill & J. 383; Elkin *v.* Moore, 6 B. Mon. 462; Buck *v.* Fisher, 4 Whart. 516.

(*j*) Lush *v.* Druse, 4 Wend. 313; Van Rensselaer *v.* Jewett, 5 Denio, 135, 2 Comst. 135; Van Rensselaer *v.* Jones, 2 Barb. 643. But see Philips *v.* Williams, 5 Gratt. 259; Dana *v.* Fiedler, 2 Kern. 40.

(*k*) Gibbs *v* Bryant, 1 Pick. 118; Sims *v.* Willing, 8 S. & R. 103; Goodloe *v.* Clay, 6 B. Mon. 236; Reid *v.* Rensselaer Glass Factory, 2 Cowen, 39, 5 id. 587.

(*l*) Dilworth *v.* Sinderling, 1 Binney, 488; Liotard *v.* Graves, 3 Caines, 226; Reid *v.* Rensselaer Glass Factory, 2 Cowen, 393, 5 id. 587; but in Hubbard *v.* Charlestown Branch R. R. Co. 11 Met. 124, where a party had overdrawn money at a bank by mistake, it was held, that interest could not be recovered until after demand made or some default in payment. See Simonds *v.* Walter, 1 McCord, 97; King *v.* Diehl, 9 S. & R. 409. See 1 American Leading Cases, 341, where, in a note under Selleck *v.* French, the whole subject of interest is thoroughly considered.

(*m*) Jacobs *v.* Adams, 1 Dall. 52; Hunt *v.* Nevers, 15 Pick. 500; Breyfogle *v.* Beckley, 16 S. & R. 264; Nelson *v.* Cartmel, 6 Dana, 7; Henderson *v.* Blanchard, 4 La. Ann. 23; Livermore *v.* Rand, 6 Foster, 85; Hantz *v.* The York Bank, 21 Penn. St. 291. And see Purdy *v.* Philips, 1 Kern. 406.

(*n*) Washington Bank *v.* Shurtleff, 4 Met. 30.

(*o*) Ackermann *v.* Ehrensperger, 16 M. & W. 99.

damages, unless there be a distinct contract to pay interest; (*p*) but there, also, this contract may be implied from the usage of trade, or from other circumstances. (*q*) In this country, the rule seems to be well established, that whoever receives money not his own, and detains it from the owner unlawfully, must pay interest therefor. Hence a public officer, retaining money wrongfully, is chargeable with interest during the time of such wrongful detainer. (*r*) So an agent, unreasonably neglecting to inform his principal of the receipt of money, is liable for the interest from the time when he should have communicated such information. (*s*) But an agent is not generally liable for interest on funds in his hands, unless he uses them, or is in default in accounting for them. (*t*) Interest is recoverable on money fraudulently obtained and withheld. (*u*)

In some of our States the statutes allow parties to a contract to make their own bargain as to the rate of interest to be paid, but provide a legal rate where no special bargain is made. Owing to this state of the law, the question has sometimes arisen, what rate shall be charged, in cases where the contract provides for a higher rate than the legal rate up to the time of maturity, but is silent as to the rate to be charged, after the time of maturity until payment. Upon this question there have been diverse decisions by the different courts; some holding

(*p*) De Bernales *v.* Fuller, 2 Camp. 426; Attwood *v.* Taylor, 1 Man. & G. 279, note. In De Havilland *v.* Bowerbank, 1 Camp. 50, Lord *Ellenborough* said, that "He thought, that where money of the plaintiff had come to the hands of the defendant to establish a right to interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used." In Calton *v.* Bragg, 15 East, 253, Lord *Ellenborough* said, "Lord *Mansfield* sat here for upwards of thirty years; Lord *Kenyon* for above thirteen years, and I have now sat here for more than nine years; and during this long course of time, no case has occurred where, upon a simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from which a contract for interest was to be inferred, has interest been ever given."

(*q*) Eddowes *v.* Hopkins, 1 Doug. 376; Moore *v.* Voughton, 1 Stark. 487; Blaney *v.* Hendrick, 3 Wilson, 205, 2 W. Bl. 761. Where the principal is to be paid at a specific time, an agreement to pay interest after that time is implied. Robinson *v.* Bland, 2 Burr. 1086; Calton *v.* Bragg, 15 East, 226, per Lord *Ellenborough*; Boddam *v.* Riley, 2 Bro. Ch. 2; Mountford *v.* Willes, 2 B. & P. 337.

(*r*) Commonwealth *v.* Crevor, 3 Binney, 123; Crane *v.* Dygert, 4 Wend. 675; People *v.* Gasherie, 9 Johns. 71; Hudson *v.* Tenney, 6 N. H. 456.

(*s*) Dodge *v.* Perkins, 9 Pick. 368.

(*t*) Ellery *v.* Cunningham, 1 Met. 112; Bedell *v.* Janney, 4 Gilman, 193; Williams *v.* Storrs, 6 Johns. Ch. 353.

(*u*) Wood *v.* Robbins, 11 Mass. 504 See *supra*, note (*b*).

that the rate fixed by the terms of the contract shall govern for the time after the breach, and others that the rate fixed by law shall then prevail. The Supreme Court of the United States, reversing the decision of the Territorial Courts of Minnesota, has decided, that the rate provided by statute shall prevail. (*v*)

Generally, where unliquidated damages are demanded, interest is not payable; nor is it in actions grounded on tort. But even in these actions, it is true that interest is excluded in name rather than fact. That is, the jury may make use of it in their own estimate of damages, if all the circumstances of the case lead to the inference that there was a contract or understanding that interest should be paid, or, if they should be satisfied that the plaintiff would not be adequately and justly compensated or indemnified without the allowance of interest. (*w*)

(*v*) Brewster *v.* Wakefield, 22 How. 118, See also, Macomber *v.* Dunham, 8 Wend. 550; U. S. Bank *v.* Chapin, 9 Wend. 471; Ludwick *v.* Huntzinger, 5 Watts & S. 51. *Contra*, Keene *v.* Keene, 3 C. B. N. S. 143; Gibbs *v.* Fremont, 9 Exch. 25, 20 Eng. L. & E. 555; Kohler *v.* Smith, 2 Cal. 597; Pridgen *v.* Andrew, 7 Tex. 461; Hopkins *v.* Crittenden, 10 Tex. 189; Kilgore *v.* Powers, 5 Blackf. 22; Chinn *v.* Hamilton, Hempst. C. C. 438; and Brewster *v.* Wakefield, 1 Minn. 352, the case mentioned in the text as reversed.

(*w*) Arnott *v.* Redfern, 3 Bing. 353; Dox *v.* Dey, 3 Wend. 356; Hull *v.* Caldwell, 6 J. J. Marsh. 208; Sargent *v.* Franklin Ins. Co. 8 Pick. 90. In Ancrum *v.* Slone, 2 Speers, 594, *Frost*, J., in delivering the opinion of the court, said: "The first [ground of appeal], presents the question of law, whether, in a special action on the case, in assumpsit on a warranty of soundness, interest is recoverable *eo nomine*. It is necessary to the allowance and estimate of interest, to ascertain the sum due, and the time when payable. Accordingly, all engagements or acknowledgments in writing, expressing the sum due and the time of payment, have been recognized as liquidated demands, and on them it has been permitted to recover interest by way of damages. Interest has also been allowed in liabilities to pay money, though not in writing, if the sum is certain or capable of being reduced to certainty, from the time when, either by the agreement of the parties or the construction of law, the payment was demandable. As in cases of money had and received, paid for the use of another; or by mistake, or on an account stated; and on open accounts by express agreement; and when, by the course of dealing between the parties or the usage of trade, such agreements may be inferred. The time of payment must also be determined, either by the agreement of the parties, the course of dealing between them, by known custom, or the usage of trade. Thus, open accounts do not bear interest, though the sum is certain; because by custom the credit is indefinite. But if there be an agreement expressed or implied, it is allowed accordingly. It is not recoverable on a *quantum meruit*, for work and labor, nor *quantum valebant*, for goods sold, nor on a verbal contract to pay a sum certain for rendering a service, 1 Hill, 393: nor on a due-bill, payable on demand, though expressed to be for a loan of money, on the day of the date, except from the time of demand, 2 Bail. 276: nor on a balance of a factor's account, due to his employer, except from the time of demand. 1 Hill, 400. Other cases might be adduced to show that the general rule is to allow interest, *eo nomine*, only on money demands certain or capa-

SECTION II.

WHAT CONSTITUTES USURY.

The statutes of usury in this country have been copied, in substance, but with more or less variation of form, from the 12 Anne, stat. 2, ch. 16, which provides, that no person shall take, directly or indirectly, upon any contract, "for loan of any moneys, wares, merchandise, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time;" and that "all bonds, contracts, and assurances whatsoever, for payment of any principal, or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void;" and further pro-

ble of being reduced to certainty, and payable at a definite time, either expressly or impliedly. There may be some exceptions to the rule, and its application has been extended by construction of law. Thus, on a breach of warranty, if the contract is rescinded by a tender of the property to the seller, *indebitatus assumpsit* will lie for the price paid, as money had and received by the vendor to the use of the vendee, and interest may be recovered. And in covenant, on a warranty of title, interest may be found, in addition to the value, for a total or partial eviction. These cases proceed on the ground of a rescission of contract and restitution to the plaintiff of the price paid. But a special assumpsit, on a warranty of soundness, for damages, is subject to the rule governing actions sounding in damages, that interest is not recoverable *eo nomine*." In Holmes *v.* Misroon, 1 Const. R. 21, 3 Brev. 209; which was a special assumpsit, the law is thus affirmed by Nott, J.: "This was a special action on the case, sounding altogether in damages, and therefore could not carry interest. I think the jury might have made the value of the property and interest thereon the measure of damages, and found a verdict for the aggregate amount; but no law has been introduced to show that they could give interest *eo nomine*, in an action of this sort. . . . . To the argument, if interest may be allowed in the aggregate damages found by a verdict, why may it not be allowed *eo nomine*? The reply is, the law does not inquire into the particulars of a verdict for damages, and in some cases interest furnishes a just and convenient measure for the jury. But it is a stated compensation for the use of money, and as it cannot be separated, even in idea, from debt, seems not properly incident to uncertain and contingent damages. The distinction is admitted to be one of form, depending upon the form and cause of action." In the same way, interest may be taken into account by the jury, in assessing damages in trespass and trover; Hyde *v.* Stone, 7 Wend. 354; Beals *v.* Guernsey, 8 Johns. 446; Kennedy *v.* Whitwell, 4 Pick. 466. And in replevin; Rowley *v.* Gibbs, 14 Johns. 385; Suydam *v.* Jenkins, 3 Sandf. 614.

vides, that any person who shall take more than five pounds per cent., contrary to the provisions of the statute, shall forfeit and lose for every such offence the treble value of the moneys, wares, merchandises, and other things so lent. (*x*) Our statutes differ greatly as to the amount which may be taken or received, the legal interest in each State being intended to represent the fair worth of money, and that varying greatly in different parts of this country. They differ also very much in the penalties with which they visit the offence of usury.

Originally, the principle of the statute of Anne was adopted generally, if not universally, and the whole debt forfeited. Afterwards, there was a considerable relaxation in this respect; but with some fluctuation and a return to severity; and now, usury works, generally, a forfeiture of the usurious interest and some part of the principal, or the lawful interest by way of penalty.

The simplest definition of usury is, the taking of more interest for the use of money than the law allows. There must therefore be the use of money; which may be by a loan, or by the continuance of an existing debt. That is, one may now lend money to another, and so give him the use of it, or may agree with him that he shall not now repay a sum which has become due, and so permit him to use it. (*y*) To the one or the other of these classes all contracts for the use of money may be referred. And, to constitute the offence of usury, there must be an agreement that he who has the use of the money

(*x*) By the 3 & 4 Will. 4, c. 98, s. 7, and 2 & 3 Vict. c. 37, enlarging the statute of William, all contracts were taken from the operation of the statute of Anne, except those contained in bills of exchange and promissory notes having more than twelve months to run, those for the loan of money less in amount than the sum of ten pounds sterling; and excepting also contracts for "the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein." Any usurious contract is therefore valid in England, with the above excepted cases. Thibault *v.* Gibson, 12 M. & W. 88; Semple *v.* Cornewall, 10 Exch. 617, 29 Eng. L. & Eq. 436.

(*y*) It is well settled, that if there be a contract for the payment of illegal interest, for the further forbearance of a debt at that time existing, or if money be actually paid for such forbearance, it is usury. Parker *v.* Ramsbottom, 5 Dowl. & R. 138, 3 B. & C. 257, *post*, p. 110, n. (*f*); Evans *v.* Negley, 13 S. & R. 218; Hancock *v.* Hodgson, 3 Scam. 333; Carlis *v.* M'Laughlin, 1 D. Chip. 111; Seneca County Bank *v.* Schermerhorn, 1 Denio, 135; Gray *v.* Belden, 3 Fla. 110; Craig *v.* Hewitt, 7 B. Mon. 475; Young *v.* Miller, 7 B. Mon. 540. See also, Pollard *v.* Scholy, Cro. Eliz. 20.

shall pay to the owner of it more than lawful interest; that is, more than the law permits to be paid for the use of money.

SECTION III.

IMMATERIALITY OF THE FORM OF THE CONTRACT.

It is entirely immaterial in what manner or form, or under what pretence this is done. (*z*) And countless are the devices by which usurers endeavor to avoid the provisions of the statute; as by lending a thousand dollars on a note for a year at lawful interest, and immediately receiving half of it back again in payment; or by selling some property, at the time of the loan, at an exorbitant price. (*a*) In these cases a nice distinction

(*z*) Symonds *v.* Cockerill, Noy, 151; Burton's case, 5 Rep. 69; Richards *v.* Brown, Cowp. 770; Doe *d.* Metcalf *v.* Brown, Holt, N. P. 295; Marsh *v.* Martindale, 3 B. & P. 154. In Floyer *v.* Edwards, Cowp. 112, Lord *Mansfield* said: "In all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other, and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money nothing will protect the taking more than five per cent., and though the statute mentions only 'for loan of moneys, wares, merchandise, or other commodities,' yet, any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" And in Scott *v.* Lloyd, 9 Pet. 446, in which the *bona fide* purchase of an annuity is admitted to be valid, although more than six per cent. profit be secured. *Marshall*, C. J., said: "Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it." See also, Tate *v.* Wellings, 3 T. R. 531; Chesterfield *v.* Janssen, 1 Atk. 340; Lawley *v.* Hooper, 3 Atk. 278; Drew *v.* Power, 1 Sch. & L. 182; Hammett *v.* Yea, 1 B. & P. 151; Mansfield *v.* Ogle, 24 Law J. N. S. Ch. 450, 31 Eng. L. & Eq. 357; Douglass *v.* McChesney, 2 Rand. 112; Andrews *v.* Pond, 13 Pet. 65; Tyson *v.* Rickard, 3 Harris & J. 113; Bank of the U. S. *v.* Waggener, 9 Pet. 378; Bank of U. S. *v.* Owens, 2 Pet. 536, 537; Lloyd *v.* Scott, 4 Pet 226; Shober *v.* Hauser, 4 Dev. & Bat. 91; Delano *v.* Rood, 1 Gilman, 690; Spaulding *v.* Bank of Muskingum, 12 Ohio, 544; Pratt *v.* Adams, 7 Paige, 615; Dowdall *v.* Lenox, 2 Edw. Ch. 267; Seymour *v.* Strong, 4 Hill, 255; per *Cowen*, J., 4 Hill, 475; Ely *v.* M'Clung, 4 Port. Ala. 128; Clarkson *v.* Garland, 1 Leigh, 147; Steptoe *v.* Harvey, 7 Leigh, 501; Brown *v.* Waters, 2 Md. Ch. Dec. 201; Wright *v.* McAlexander, 11 Ala. 236; Williams *v.* Williams, 3 Green, N. J. 255; Heytle *v.* Logan, 1 A. K. Marsh. 529; Brown *v.* Nevitt, 27 Miss. 801.

(*a*) See Lowe *v.* Waller, Doug. 736. In this case the defendant applied several times to Harris & Stratton to obtain the discount of a bill for £200, who had replied that they could not advance money, but only goods. Subsequently the de-

has been made as to the *onus* of proving value. In general, the lender or nominal seller is not called upon to prove, that the value of the goods purporting to be sold and delivered instead of the whole or a part of the money required, was great enough to relieve the contract from usury; (*b*) but, if it is shown that the borrower was compelled to receive the goods, this casts suspicion on the transaction, and the lender is now obliged to exculpate himself by proof of their value. (*c*) Where, however,

fendant agreed to take a certain quantity of goods, which were delivered to him, and the bill of exchange delivered to Harris & Stratton, together with collateral security for its payment. The goods were disposed of by the defendant to an auctioneer for £120. In an action upon the bill, against the defendant, to which the defence of usury was pleaded, Lord *Mansfield* directed the jury that they were to consider, whether the transaction between the defendant and Harris & Stratton, was not, in truth, a loan of money, and the sale of goods a mere contrivance and evasion. The jury having found the contract usurious, a rule for a new trial was granted, and subsequently Lord *Mansfield* delivered the opinion of the court discharging the rule. In Barker *v.* Vansommer, 1 Brown, Ch. 149, the plaintiff had given a promissory note to Vansommer & Co. for £2,225, upon receiving from them silks valued by the parties at that amount, but which were sold by the plaintiff for £799. This bill was brought by the plaintiff to have the note given up. Lord *Thurlow* said, that the court was to inquire whether, under the mask of trading, this was not a method of lending money at an extraordinary rate of interest, and that there was not a doubt that the transaction was merely for the purpose of raising money. A decree for relief was made. In Doe *d.* Davidson *v.* Barnard, 1 Esp. 11, which was an action upon a mortgage, the defendant proved that the mortgage debt was the delivery of stock to the defendant, at 75 per cent. on its value, which he was compelled to sell at 73 per cent., the market price at that time. Lord *Kenyon* held the transaction clearly usurious. See also, Pratt *v.* Willey, 1 Esp. 40. The proposition, that where upon negotiations for a loan the borrower receives depreciated bank-notes, or property of any kind of a less value than the nominal amount of the loan, such transaction is usurious, is supported by the following American authorities: Delano *v.* Rood, 1 Gilman, 690; Morgan *v.* Schermerhorn, 1 Paige, 544; Grosvenor *v.* Flax & Hemp Manuf. Co. 1 Green, Ch. 453; Valley Bank *v.* Stribling, 7 Leigh, 26; Greenhow *v.* Harris, 6 Munf. 472; Archer *v.* Putnam, 12 Smedes & M. 286; Swanson *v.* White, 5 Humph. 373; Anonymous, 2 Desaus. 333; Bank of U. S. *v.* Owens, 2 Pet. 527; Rose *v.* Dickson, 7 Johns. 196; Dry Dock Bank *v.* Amer. Life Ins. & Trust Co. 3 Comst. 344; Douglass *v.* McChesney, 2 Rand. 109; Stribling *v.* Bank of the Valley, 5 Rand, 132; Ehringhaus *v.* Ford, 3 Ired. 522; Eagleson *v.* Shotwell, 1 Johns. Ch. 536; Pratt *v.* Adams, 7 Paige, 615; Weatherhead *v.* Boyers, 7 Yerg. 545; Collins *v.* Secreh, 7 T. B. Mon. 335; Burnham *v.* Gentrys, id. 354; Warfield *v.* Boswell, 2 Dana, 224; Moore *v.* Vance, 3 Dana, 366, 367; Vail *v.* Heastis, 14 Ind. 607. But where the transaction is a sale, and not a shift to cover a loan, depreciated bank-notes or stock may be disposed of at a rate above their current market value without usury. Bank of U. S. *v.* Waggener, 9 Pet. 400; Willoughby *v.* Comstock, 3 Edw. Ch. 424. And where the discount upon uncurrent money is very trifling, and the same will pass in the market in the way of trade, it seems that its reception at par is no violation of the statute. Slosson *v.* Duff, 1 Barb. 432. Or if the borrower has the option of returning the depreciated bank-notes at the same rate at which he received them, this it seems prevents the transaction from being usurious. Caton *v.* Shaw, 2 Harris & G. 13.

(*b*) Rich *v.* Topping, 1 Esp. 176; Coombe *v.* Miles, 2 Camp. 553; Grosvenor *v.* Flax & Hemp Manuf. Co. 1 Green, Ch. 453.

(*c*) Hargreaves *v.* Hutchinson, 2 A. & E. 12; Davis *v.* Hardacre, 2 Camp. 375.

as in the case just supposed, goods are delivered and received as a part or the whole of the money advanced, and the borrower sells them, he cannot keep the price by proving the contract to be usurious, nor is he answerable for them in their value at the time they were delivered; but for what he actually receives; as it is considered that they were given him to be sold. Some of the devices resorted to it is difficult to detect or to prevent; but in all cases, the only question for the jury is, has one party had the use of the money of the other, and has he paid him for it more than lawful interest, in any way or manner. And in this determination the contract will not be held good, merely because, upon its face, and by its words, it is free from taint, if substantially it be usurious; nor, if it be in words and form usurious, will it be held so, if in substance and fact it is entirely legal. (*d*) And these questions are for the jury only, who must judge of the intention of the parties, which lies at the foundation of the inquiry, from all the evidence and circumstances. (*e*) And the questions which are presented thus are sometimes extremely nice. Thus a contract to borrow stock, valued at more than the market price, and to pay lawful interest on this valuation, would, in our opinion, be usurious, although the interest reserved might be no more than the stock earns; (*f*) but,

In this case the defendant applied to the plaintiff to discount a bill of exchange of £700 for him. The plaintiff refused to do so unless the defendant would take a check for £250, a promissory note for £286, and a landscape in imitation of *Poussin*, to be valued at £150. The action was brought by the plaintiff upon the bill. Lord *Ellenborough* said: "Where a party is compelled to take goods, in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods by the person who owes on the bill. In the present case I must require such evidence to be adduced; and I wish it may be understood that, in similar cases, this is the rule by which I shall be governed for the future. When a man goes to get a bill discounted, his object is to procure cash, not to encumber himself with goods. Therefore, if goods are forced upon him, I must have proof that they were estimated at a sum for which he could render them available upon a resale, not at what might possibly be a fair price to charge to a purchaser who stood in need of them."

(*d*) Per Lord *Tenterden*, C. J., Beete *v.* Bidgood, 7 B. & C. 458; Andrews *v.* Pond, 13 Pet. 76.

(*e*) Doe *d.* Metcalfe *v.* Brown, 1 Holt, N. P. 295; Mastermann *v.* Cowrie, 3 Camp. 488; Carstairs *v.* Stein, 4 M. & S. 192; Smith *v.* Brush, 8 Johns. 84; Thomas *v.* Catheral, 5 Gill & J. 23; Tyson *v.* Rickard, 3 Harris & J. 109; Stevens *v.* Davis, 3 Met. 211; Andrews *v.* Pond, 13 Pet. 76, 77.

(*f*) In Parker *v.* Ramsbottom, 5 Dowl. & R. 138, 3 B. & C. 257, B & C being indebted to the plaintiff for £15,000, in stock previously advanced, it was agreed between the parties that B & C should be released from replacing the stock, and that instead thereof they should account for it in money, at the value of £10,000, paying

if the stock be sold, and the money arising be loaned, with an agreement to replace the stock on a certain day, and to pay such interest as the stock would have earned in the mean time, it is not usurious. (*g*)

So, one may lend stock to be replaced; (*h*) or he may lend the price which it is sold for; or he may give the borrower the option, either to replace the stock, or repay the money, with in-

5 per cent. interest thereon until the principal and all interest should be repaid. At the date of this agreement the market value of the stock was only £8,400. The plaintiff claimed, upon the issue in this case, to prove, under a commission of bankruptcy against B and C, the amount of his claim under this agreement. *Abbott*, C. J., said: "It appears to me that the agreement is clearly void for usury, because it secures to the plaintiff the sum of £10,000 as the value of the stock then remaining to be replaced, though the real value of that stock was then only £8,400." *Bayley*, J., said: "I entertain no doubt that the agreement was usurious, and consequently void. The statute evidently applies to loans of goods, or any thing that can be called money's worth, as well as loans of money itself. In this case the original bargain was for the return of a loan of stock, which was a perfectly legal bargain; that stock, when first sold out, produced £10,000, but when the second bargain was made it was worth only £8,400; therefore at that time the plaintiff was lending a stock worth £8,400 only, and stipulating to be repaid by £10,000, with legal interest on that larger sum. That was certainly usurious." In Astor *v.* Price, 19 Mart. (La.), 408, which was an action on certain bills of exchange, the defence was usury. The consideration for the bills was a loan, purporting to be $64,000, for which the plaintiff charged interest; but he disbursed only $8,850 in cash, and the remainder of the loan was United States Bank stock, at the rate of $105⅝ per share, when the market value at that time was only $104⅛ or thereabouts. The court *held* the transaction usurious and the bills void.

(*g*) Tate *v.* Wellings, 3 T. R. 531. Here the defendant applied to the plaintiff's testator to borrow money, the testator agreed to let him have it, but told him that he should expect the same interest which he received in the short annuities, namely, 8½ per cent., and which, being assented to, it was agreed that the money should be raised by a sale of short annuities, to the amount of £900, which the defendant was to replace, in the same stock, by the 1st of September, 1785; but if it were not replaced by that time, he was then to repay that sum on the first of January, 1786, and in the mean time to pay such interest as the stock would have produced. The jury having found that the transaction was an honest loan of stock, the court refused to disturb the verdict. *Ashhurst*, J., said: "The question is, whether this transaction was merely colorable, and intended as a loan of money, upon which usurious interest was to be taken, or a loan of stock. It appeared from the evidence, that in substance this was a loan of stock. The agreement was, that the defendant should have the use of the money, which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day, till which time the lender was to run the risk of the fall of the stocks; but he stipulated that, if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced, at all events. And from this contract he derived no advantage, for he was only to receive in the mean time the same interest which the stock would have produced. Now, though this might have been used as a color for usury, it was a question for the consideration of the jury, and they have negatived it."

(*h*) Forrest *v.* Elwes, 4 Ves. 492. In this case £8,000 old South Sea annuities were loaned, the value at the time being £7,170, and a bond given by the borrower to replace the stock in six months, and in the mean time to pay lawful interest on £7,170. It was contended, that the bond was, upon the face of it, a usurious contract; but the point was afterwards given up, and the Master of the Rolls decreed the bond good.

terest; but if he reserves this option to himself, it is held to be usurious. (*i*) The lender may lend stock, and reserve, by way of interest, the dividends which would be paid on it, whatever they may be, provided he agrees at the time of the loan to take them; (*j*) for they may be more or less than the interest; but he cannot contract that he shall have them, if more than the interest, and if less, so much more as shall make the whole amount received equal to legal interest.

If a contract be in part for usurious interest, and it is made by two instruments, one promising to pay the principal, with or

(*i*) Barnard *v.* Young, 17 Ves. 44. In this case £8,500 East India stock was transferred as security for the performance of an agreement that £16,096 of the three per cents, which was the amount of three per cents that £10,000 would have purchased at the date when a debt for £10,000 had become due from the plaintiffs to the defendant, should be transferred to the defendant on the 30th of the next September, or that the debt of £10,000 should be paid, at the defendant's option, and that in either case five per cent. interest on the £10,000 should be paid to the defendant. Upon a bill filed to have the assignment of the East India stock produced, Sir *William Grant*, M. R., said, that the contract was usurious, as it reserved the capital, with legal interest upon it, and likewise a contingent advantage, without putting, either capital or interest in any kind of risk. The lender was to have, at his election, his principal and interest, or to have a given quantity of stock transferred to him. This principal never was at any hazard, as he was at all events sure of having that with legal interest, and had the chance of an advantage if the stock rose. It was usurious to stipulate for that chance, and the contract was therefore, in fact, a usurious contract. In White *v.* Wright, 3 B. & C. 273, White sold out £400 stock, in the three per cent. consolidated bank annuities, for £223, which he loaned to the defendant, who executed an agreement that after one year she would, if requested, transfer to White £400 like stock, and would in the mean time pay all dividends which the stock would produce. The defendant also executed a bond to White, conditioned for the payment of £223 and interest, to him, on a certain date The present action was brought upon the agreement to transfer the stock. *Abbott*, C. J., said: "Here if the lender, after receiving five per cent. interest on his money, had afterwards, on a rise in the stocks, compelled the defendant to replace the stock sold, he would have had principal, interest, and a premium besides. That is an advantage which by law he was not entitled to contract for. The contract was therefore usurious." *Bayley*, J., said: "A party may lawfully lend stock as stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to repay it, either in the one way or the other. But he cannot legally reserve to himself a right to determine, in future, which it shall be. It is not illegal to reserve the dividends, by way of interest for stock lent, although they may amount to more than £5 per cent. on the produce of it; for the price of stock may fall, and then the borrower would be a gainer; but the option must be made at the time of the loan. The instruments set out in this case show that an option to be exercised in future was reserved." And the court ordered a nonsuit. In Chippindale *v.* Thurston, 1 Moody & M. 411, £500 was loaned, and the borrower agreed to repay it in three per cent. consols, at a price not exceeding 68½ per cent., or to repay it in Bank of England notes upon six months' notice. The court ordered a nonsuit, on the ground that the option was with the lender, and the contract therefore clearly usurious, as he could not have less than five per cent. interest, and might have more than the £500 lent, if the funds rose above 68½.

(*j*) *Bayley*, J., White *v.* Wright, 3 B. & C. 278, in note (*i*) *supra*. See also, Potter *v.* Yale College, 8 Conn. 52.

without lawful interest, and the other promising to pay the usurious interest as a principal, with or without interest, it would seem that it is not this last promise alone which is void, but both, because both together form one contract, which is tainted with usury. (*k*) So, if there be a note, and a separate oral promise to pay usurious interest, the note is void. (*l*) The authorities differ on this point, but the prevailing rule is, that if the design of the whole transaction, and the inducement to it, are to lend money on usurious interest, the taint of usury affects the whole and every part of the contract, and no one portion thereof, although in form an independent contract, is made valid by the fact that taken by itself it is free from objection. The very fraud consists in disguising usury, by separating the contract into these parts. (*m*) The common way in which, in our mercantile cities, the usury laws are now evaded, we suppose to be this. A valid bargain is made for the payment of money with interest; the additional bonus or premium is left entirely at the pleasure of the borrower, with the understanding that the worth of money at that time is a certain per cent.

(*k*) In Roberts *v.* Trenayne, Cro. Jac. 507, Mary Addington loaned Cory £150, and for security of its repayment Cory leased to Mary Addington a close for sixty years, conditioned to become void if he paid the £150 within two years. It was then further agreed that Cory should give to Mary Addington annual interest of twenty-two pounds ten shillings, by means of a grant, by fine, of a rent charge, which was done. Cory afterwards granted the inheritance to the plaintiff, who brought this action of trespass against the defendant, husband of Mary Addington. "It was moved, whether this lease, being taken for the payment of the principal money, and not for the payment of any part of the usury, be within the statute, to make the bargain void? — *It was resolved*, that it is: because it is for the security of money lent upon interest, and for the securing of that which the statute intends he should lose; for otherwise it would be an evasion out of the statute, that he would provide for the securing of the payment of the principal, whatsoever usurious bargain was made, which the law will not permit." In White *v.* Wright, 3 B. & C. 273, *ante*, p. 112, n. (*i*). White loaned the defendant £400 stock, and received an agreement to transfer £400 like stock, and in the mean time pay the dividends the stock would earn. By another agreement the defendant agreed absolutely to pay £223 and interest, to the plaintiff, on a certain day. This action was brought upon the first agreement to retransfer the stock. The first agreement, although lawful in itself, was held, upon the authority of Roberts *v.* Trenayne, to be vitiated by the other bond for the payment of illegal interest. To the same effect, are Motte *v.* Dorrell, 1 McCord, 350; Clark *v.* Badgley, 3 Halst. 233; Postlethwait *v.* Garrett, 3 T. B. Mon. 345; Fitch *v.* Hamlin, 1 Root, 110; Swartwout *v.* Payne, 19 Johns. 294; Gray *v.* Brown, 22 Ala. 273.

(*l*) Merrills *v.* Law, 9 Cowen, 65; Macomber *v.* Dunham, 8 Wend. 550; Hammond *v.* Hopping, 13 Wend. 505; Willard *v.* Reeder, 2 McCord, 369; Lear *v.* Yarnel, 3 A. K. Marsh. 419; Atwood *v.* Whittlesey, 2 Root, 37; *contra*, Butterfield *v.* Kidder, 8 Pick. 512.

(*m*) Ibid.; Warren *v.* Crabtree, 1 Greenl. 171.

Then there is no contract which is not legal; if, when the money is due, nothing but simple interest is paid, nothing more can be demanded by any contract, and the lender trusts to the fact that a borrower, who thus executes only his contract, would not be able to borrow again. But if this understanding assumes distinctness enough to become a *contract* for the repayment of additional interest, we are satisfied that the penalties of the usury law would attach to it. The difficulty of distinguishing between a mere understanding and a promise might often be great. If money was actually paid for the use of the sum loaned, over and above the lawful interest, a similar question would arise, whether it was paid in pursuance of a contract to pay, so that the penalty would be incurred; or whether it was a mere gratuity. The rule of law must be, that if A lends to B a sum for a given time, on simple interest, and B, on paying this money, manifests his gratitude for the accommodation by a free gift to A, either of money or a chattel, there is no usury in this; but if the money is paid, or a chattel given, in performance of a previous promise to pay, then the penalty of usury must attach; and in each case it must be a question of fact whether the payment is in the nature of a gift, or of the execution of a promise.

It should be remarked, that if a foreign contract provides for interest which is lawful where the contract is made, it will not be declared void for usury in a State in which only a less interest is allowed by law. (*n*) But if a usurious contract is made in a State in which it is wholly void, because of such usury, it cannot be recognized in another State in which the penalty is a forfeiture of a part only, and enforced there for all but this part. (*o*)

It would seem that there must be an intent to take usury, to constitute the offence. Hence the usual discount of a bank,

(*n*) Harvey *v.* Archbold, 3 B. & C. 626; Thompson *v.* Powles, 2 Simons, 211; De Wolf *v.* Johnson, 10 Wheat. 367; Chapman *v.* Robertson, 6 Paige, 627; Pratt *v.* Adams, 7 Paige, 615. See on this subject, *ante*, Vol. II. p. 584, n. (*h*). Nichols *v.* Cosset, 1 Root, 294; McQueen *v.* Burns, 1 Hawks, 476; M'Guire *v.* Warder, 1 Wash (Va.), 368; Robb *v.* Halsey, 11 Smedes & M. 140. See also, Gale *v.* Eastman, 7 Met. 14; Jacks *v.* Nichols, 1 Seld. 178; Davis *v.* Garr, 2 id. 134; Turpin *v.* Povall, 8 Leigh, 93.

(*o*) Houghton *v.* Page, 2 N. H. 42.

although it takes in fact something more than lawful interest, is not usury. (*p*)

SECTION IV.

THE CONTRACT ITSELF MUST BE TAINTED WITH THE USURY.

In order that a contract or debt should be avoided as usurious, it is necessary that it should *itself* be tainted with this offence; for if any subsequent contract in payment of the first be usurious, this second contract will be void, and will therefore leave the original contract or debt wholly unpaid, and it may be enforced as if the second had not been made. (*q*) Thus, if

(*p*) Quinsigamond Bank *v.* Hobbs, S. J. C. Mass. 1858, 21 Law Reporter, 564; Jarvis' appeal from Probate, 27 Conn. 432.

(*q*) Radley *v.* Manning, 3 Keble, 142, pl. 13. "In debt upon an obligation, upon oyer, the condition was to pay by a certain day. The defendant pleaded the statute, 12 Car. 2, and said that the contract was usurious, but *per curiam*, being made after the bond forfeited to receive interest, according to the penalty, which was double the principal, it doth not void the obligation that was good at first, but only subjects the taker to other penalties, and judgment for the plaintiff." In Anonymous, 1 Bulst. 17, T. N. executed to J. P. a bond for £66, 6*d*. principal, and £6 legal interest, payable in one year. Within the year the obligor paid the £6 interest, and afterwards, an action being brought for the non-payment of the principal, the obligor pleaded the statute of usury, because the obligee took the use money within the year. "It was resolved by the whole court, that his taking of the use money within the year shall not avoid the obligation, and that this taking is no usury within the statute." *Williams*, Justice: "Where the first contract is not usurious, this shall never be made usury, within the statute, by matter *ex post facto*; as if one contract with another to borrow £100 for a year, and to give him £10 for interest, at the end of the year, if he pays the interest within the year, this is not usury within the statute to avoid the obligation, or to give a forfeiture of the money within the statute, because that this contract was not usurious at the beginning; which was agreed by the whole court, and judgment given for the plaintiff." In Pollard *v.* Scholy, Cro. Eliz. 20, Pollard sold defendant two oxen, for six pounds six shillings and eight pence, to be paid at All-Saints next, and on the same day the defendant required longer day of payment, upon which Pollard gave him till the first of May next, receiving therefor three quarters of wheat, which was above the value of ten pounds per cent. upon the debt. In debt for the price of the oxen, usury was set up as a defence. The opinion of the justices was, that the last contract was void, but the first good, being made *bona fide*. Ferrall *v.* Shaen, 1 Saund. 294, was debt upon a bond, for payment of £300, to which the defendant pleaded that the plaintiff had received £30 for delaying the day of payment of the bond one year, which was usurious. The court adjudged the plea not good, for here the bond was good when it was made, and then a usurious contract afterwards cannot make it void, although the penalty for usury was incurred. In Nichols *v.* Lee, 3 Anstr. 940, where to debt upon a bond, the plea was, that after the execution of the bond the plaintiff received from the defendant more than lawful interest, *Macdonald*, C. B., said: "There is nothing more settled than this point; to avoid a security as usurious, you must show that the agreement was

one who, as joint surety, has paid the whole of a debt, and so acquired a claim for contribution for one half, settles this claim by receiving a note with usurious interest, this note cannot be collected, but the original claim for contribution revives and may be enforced. (*r*) So an agreement to pay more than interest, by way of penalty for not paying the debt, is not usurious, because the debtor may relieve himself by paying the debt with lawful interest, and even if he incurs the penalty, this may be reduced to the actual debt. (*s*) And if money be

illegal from its origin." The same principle is established in the following cases: Ballard *v.* Oddey, 2 Mod. 307; Parr *v.* Eliason, 1 East, 92; Rex *v.* Allen, T. Raym. 196; Parker *v.* Ramsbottom, 3 B. & C. 257; *Supra*, n. (*f*); Phillips *v.* Cockayne, 3 Camp. 119; Gray *v.* Fowler, 1 H. Bl. 462; Daniel *v.* Cartony, 1 Esp. 274; *Buller*, J., Tate *v.* Wellings, 3 T. R. 531; Bush *v.* Livingston, 2 Caines, Cas. 66; Nichols *v.* Fearson, 7 Pet. 107; Pollard *v.* Baylors, 6 Munf. 433; *Roane*, J., Pollard *v.* Baylor, 4 Hen. & M. 232; Merrills *v.* Law, 9 Cowen, 65; Hughes *v.* Wheeler, 8 Cowen, 77; Rice *v.* Welling, 5 Wend. 597; Swartwout *v.* Payne, 19 Johns. 294; Craine *v.* Hubbel, 7 Paige, 417; Brown *v.* Dewey, 1 Sandf. Ch. 56; *Johnson*, J., in Gaither *v.* Farmers and Mechanics Bank, 1 Pet. 43; Gardner *v.* Flagg, 8 Mass. 101; *Parker*, C. J., Frye *v.* Barker, 1 Pick. 267; Edgell *v.* Stanford, 6 Vt. 551; Hammond *v.* Smith, 17 Vt. 231; Sloan *v.* Sommers, 2 Green, (N. J.), 509; *Ruffin*, J., Collier *v.* Nevil, 3 Dev. 32; Indianapolis Ins. Co. *v.* Brown, 6 Blackf. 378; Varick *v.* Crane, 3 Green, Ch. 128; Brown *v.* Toell, 5 Rand. 543. See also, Abrahams *v.* Bunn, 4 Burr. 2253.

(*r*) Johnson *v.* Johnson, 11 Mass. 359.

(*s*) Burton's case, 5 Rep. 69; Vin. Abr. *Usury*, C.: "If a man obliges himself in nine marks to pay at a certain day, and that if he does not pay at the day, he obliges himself by the same deed to pay to him seventeen marks; this is not usury, but it is only a pain. 26 E. 3, 71." In Roberts *v.* Trenayne, Cro. Jac. 507, *Doderidge*, J., took this difference in cases of casual usury: "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury; as if I lend to one a hundred pounds for two years, to pay for the loan thereof thirty pounds, and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury, for the party hath his election; and may pay it at the first year's end, and so discharge himself." In Garrett *v.* Foote, Comb. 133, *Holt* said: "If I covenant to pay £100 a year hence, and if I do not pay it to pay £20, it is not usury, but only in the nature of a *nomine pœnæ*." In Groves *v.* Graves, 1 Wash. (Va.), 1, there was an agreement for the payment of a debt, by the delivery of certificates of "Pierce's final settlements," at the rate of twenty shillings for every twenty-six pence of the money advanced, and if the debt was not paid at a certain time, that the certificates should be paid at the rate of twenty shillings for every thirteen pence. The *President* held, that the agreement to pay certificates at half their value, was a penalty only, and the contract therefore not usurious. In Winslow *v.* Dawson, 1 Wash. (Va.), 118, a debt for £200 being due, two bonds were executed, one for £100, the other for £150, at a certain time, to which latter bond a memorandum was affixed, that it might be discharged by the payment of £100, if paid at an earlier date than the time mentioned in the condition. The contract was held not usurious. The *President* said: "The case of Groves *v.* Graves, in this court, has decided this principle, viz.: that such a contract, to pay a larger sum at a future day, is not usurious; but that the increased sum shall be considered as a penalty against which a court of equity ought to relieve, upon compensation being made." See also, Cutler *v.* How, 8 Mass. 257; Pollard *v.* Baylors, 6 Munf. 433; *Roane*, J., Pollard *v.* Baylor, 4 Hen. & M. 232; Brock *v.* Thompson, 1 Bailey, 322; Campbell *v.* Shields, 6 Leigh, 517; *Fleming*, J., Call *v.* Scott, 4 Call, 409; Moore *v.* Hylton, 1 Dev. Eq. 429; Brock

due, and the creditor, at the request of the debtor, agrees to give him time, on condition that the debtor shall continue to pay legal interest, and also such further interest as the creditor may be obliged to pay for money to be raised by him to take the place of the money due from the debtor, such agreement is not usurious; and if the debtor pay such extra interest, he cannot recover it back as a usurious payment. (*t*) Nor will the taking of usurious interest imply conclusively a prior agreement to take; as if a bond be given for principal and lawful interest, if usurious interest be taken afterwards, this does not prove conclusively that such was the secret original agreement; (*u*) although it is *prima facie* evidence. (*v*) But by some authorities the presumption is only of an intentional new usurious contract at the time of payment. (*w*)

SECTION V.

SUBSTITUTED SECURITIES ARE VOID.

If the statute of usury provides that a usurious contract is void, then no subsequent circumstance can make the original contract good; and consequently, a promissory negotiable note, void at its inception for usury, is equally void in the hands of innocent indorsees. (*x*)

way *v.* Clark, 6 Ham. 45; Wight *v.* Shuck, 1 Morris, 425; Shuck *v.* Wight, 1 Greene (Iowa), 128; Gambril *v.* Rose, 8 Blackf. 140; Lawrence *v.* Cowles, 13 Ill. 577; Thompson *v.* Jones, 1 Stewart, 564; Long *v.* Storie, 9 Hare, 142, 10 Eng. L. & Eq. 182; Floyer *v.* Edwards, Cowp. 112.

(*t*) Kimball *v.* Proprietors of Boston Athenæum, 3 Gray, 225. The main ground of the decision was, that the gist of all the usury laws, from 1641 to 1846, is the taking of unlawful profits; whereas here there is no taking of any profit, by the creditor, who is, in fact, the agent of the debtor for raising the money.

(*u*) Fussil *v.* Brookes, 2 Car. & P. 318; Hammond *v.* Smith, 17 Vt. 231.

(*v*) Ferrall *v.* Shaen, 1 Saund. 295, note; New York Firemen Ins. Co. *v.* Ely, 2 Cowen, 705; Cummins *v.* Wise, 2 Halstead's Ch. 73; Varick *v.* Crane, 3 Green, Ch. 128; Quarles *v.* Brannon, 5 Strobh. 151.

(*w*) Hammond *v.* Smith, 16 Vt. 231.

(*x*) Lowe *v.* Waller, Doug. 736, *supra*, 108, n. (*a*); Ackland *v.* Pearce, 2 Camp. 599; Young *v.* Wright, 1 Camp. 139; Wilkie *v.* Roosevelt, 3 Johns. Cas. 66; Hackley *v.* Sprague, 10 Wend. 113; Lloyd *v.* Scott, 4 Pet. 228; Chadbourn *v.* Watts, 10 Mass. 121; Bridge *v.* Hubbard, 15 Mass. 96; Sauerwein *v.* Bunner, 1 Harris & G. 477; Faris *v.* King, 1 Stewart, 255; *Sewall*, J., Chadbourn *v.* Watts, 10 Mass. 121; Payne *v.* Treze-

Whether a note, valid in its inception, but usuriously transferred by the payee or indorsee, is valid against the maker, has been variously decided. (y) And the authorities differ on the question whether such a note is valid as against the maker in the hands of the usurious indorsee himself; the objection being, that no rights can grow out of an illegal, and therefore invalid transaction. (z) There are, however, cases of high authority, which hold that the maker is liable to the indorsee, even if the indorser be not so liable, on the ground that the indorsement operates as an executed transfer of the property in the note, and does not remain executory, like the indorser's general liability to pay the note, on the maker's default. (a) In the section on the sale of notes, we shall consider this question, and give our reasons for holding, that where such a transaction is a *bona fide* sale of the note, both maker and indorser are held for the whole face of the paper.

To remedy the hardship imposed upon innocent holders of negotiable paper, under the English construction of the rule that usurious instruments are absolutely void, the statute of 58 Geo. III. c. 93, was passed, declaring, that no bill or note should be invalidated in the hands of a holder for value without notice. And exceptions to the same effect may be found in some of the statutes of usury in this country. (b) But

vant, 2 Bay, 23; Gaillard *v.* Le Seigneur, 1 McMullan, 225; Solomons *v.* Jones, 3 Brev. 54; Townsend *v.* Bush, 1 Conn. 260. See also, Shober *v.* Hauser, 4 Dev. & B. 97. It is otherwise where the statute of usury does not declare the contract void. *Story*, J., Fleckner *v.* U. S. Bank, 8 Wheat. 354; Young *v.* Berkley, 2 N. H. 410; Creed *v.* Stevens, 4 Whart. 223; Conkling *v.* Underhill, 3 Scam. 388; Wells *v.* Porter, 5 B. Mon. 424; McGill *v.* Ware, 4 Scam. 21; Tucker *v.* Wilamouicz, 3 Eng. 157. See also, Turner *v.* Calvert, 12 S. & R. 46; Fenno *v.* Sayre, 3 Ala. 458.

(y) Lord *Kenyon* originally held that such holder would be entitled to recover. Daniel *v.* Cartony, 1 Esp. 274; Parr *v.* Eliason, 1 East, 92. In Lowes *v.* Mazzaredo, 1 Stark. 385, however, the court decided, that usury on the part of the payee of a note was a bar to an action by a *bona fide* holder, because he could not bring himself in connection with the maker, except through the medium of usurious indorsement; and this case was approved in Chapman *v.* Black, 2 B. & Ald. 589. But Bush *v.* Livingston, 2 Caines, Cas. 66; Foltz *v.* Mey, 1 Bay, 486; Campbell *v.* Read, Martin & Y. 392, decided, that a note thus usuriously indorsed is valid against the maker, in the hands of a holder in good faith.

(z) See Lloyd *v.* Keach, 2 Conn. 175; Gaither *v.* Farmers & Mechanics Bank, 1 Pet. 44; Nichols *v.* Fearson, 7 Pet. 107, and Freeman *v.* Brittin, 2 Harrison, 191.

(a) Munn *v.* Commission Co. 15 Johns. 44; Collier *v.* Nevill, 3 Dev. 30; Knights *v.* Putnam, 3 Pick. 184. See also, Littell *v.* Hord, Hardin, 81.

(b) See Chapman *v.* Black, 2 B. & Ald. 589, and Hackley *v.* Sprague, 10 Wend 113.

where the statute contains such a provision, and also provides, as the penalty for usury, the deduction in an action against the debtor, of the excessive interest secured, and the indorsee takes it after it becomes due, the deduction, it is said, may be made against him. (*c*)

But if such note, or any securities for an usurious debt, be given up and cancelled, on the promise of the debtor to pay the original debt, with lawful interest, this promise is valid, being founded on a good consideration. (*d*) So also, it is true in general, that any security given in payment or discharge of a usurious security, is equally void with that. (*e*) But when a

(*c*) Wing *v.* Dunn, 24 Me. 128.

(*d*) Barnes *v.* Headley, 2 Taunt. 184. In this case an agreement was made between Webb and Harrie & Suthmier, by which Webb was to advance them money to purchase sugars with, from time to time, for which he was to receive five per cent. interest, and also a commission of five per cent. upon all sugars purchased. To secure the repayment of the principal, interest, and commissions, certain deeds and securities were executed to Webb. Under this agreement Webb made out four successive half-yearly accounts, charging according to the agreement for the money advanced; and various sums were, from time to time, paid on this account. The sugars were not purchased or procured by Webb, but by Harrie & Suthmier, in their own names. Upon the parties being informed, and realizing that this transaction was usurious, and that Webb was in danger of losing the whole of his money, Webb, in accordance with an arrangement then made, drew up fresh accounts, deducting all charges for commission, and charging five per cent. interest only, on the money actually advanced. This account was acknowledged by the debtors to be correct, and they promised to pay it, whereupon the original securities were given up, and the original agreement cancelled and burned. This action was brought upon the last account against the assignees of Harrie & Suthmier; and the court held that it was maintainable. See Wicks *v.* Gogerly, 1 Ryan & M. 123.

(*e*) Preston *v.* Jackson, 2 Stark. 237, was an action on a promissory note, by an indorsee against the maker. The payee was called, and testified that he had lent the defendant 100*l.*, for which he was to receive 50*l.*, by way of interest, and took his bond for 150*l.* That he afterwards lent 100*l.* more upon the same terms, and that in August, 1814, the former securities were given up, and the note sued upon, given for the interest. *Holroyd*, J., held the note void. In Pickering *v.* Banks, Forrest, 72, the defendant had given the plaintiff bills for a usurious consideration, some of which he had paid; the remainder not being discharged when they became due, the defendant gave a warrant of attorney for the balance on which the plaintiff had entered up judgment. *Macdonald*, C. B., ordered the judgment to be set aside, and the warrant of attorney to be delivered up. In Chapman *v.* Black, 2 B. & Ald. 589, a bill of exchange was in the hands of the plaintiff, which had been usuriously indorsed by a prior party. Upon being informed of this, the plaintiff procured a new bill to be accepted by the defendant, in which the usurious indorser was omitted. The present action was brought upon the last bill, and *Abbott*, C. J., delivered the opinion of the court, that the bill was void. In Bridge *v.* Hubbard, 15 Mass. 96, Blanchard & Ford, the makers of a note void for usury, being called on for payment, asked for a longer credit, which was given on condition that other security should be obtained. The note sued on was then procured, signed by the defendant, who was liable as indorser on the first note; it was made payable to T. W. Sumner, who indorsed it in blank, under which indorsement the plaintiffs claimed. The court held the note sued upon to be a mere substituted contract for the former usurious one, and void in the

new and innocent party is introduced into the substituted security, the weight of authority would lead to the conclusion that such security is valid as to him. (*f*) And if the borrower allows the usurious claim to become merged in a judgment, it is then too late to take advantage of the defence of usury. (*g*) But it is also true, that if, in the bargain respecting the new security, there is an agreement to expunge or exclude, or an actual exclusion of the unlawful interest, the new security is valid. (*h*)

plaintiff's hands. See also, to the same effect, Marsh *v.* Martindale, 3 B. & P. 154, and the following American decisions: Walker *v.* Bank of Washington, 3 How. 62; Powell *v.* Waters, 8 Cowen, 685; Reed *v.* Smith, 9 Cowen, 647; Tuthill *v.* Davis, 20 Johns. 285; Jackson *v.* Packard, 6 Wend. 415; Steele *v.* Whipple, 21 Wend. 103; Gibson *v.* Stearns, 3 N. H. 185; Morcure *v.* Dermott, 13 Pet. 345; Collins *v.* Roberts, Brayt. 235; *Swift*, C. J., Scott *v.* Lewis, 2 Conn. 135; Botsford *v.* Sanford, id. 276; Wales *v.* Webb, 5 Conn. 154; Warren *v.* Crabtree, 1 Greenl. 167; Lowell *v.* Johnson, 14 Me. 240; Edwards *v.* Skirving, 1 Brev. 548; Dunning *v.* Merrill, 1 Clarke, Ch. 252; Torrey *v.* Grant, 10 Smedes & M. 89; Jackson *v.* Jones, 13 Ala. 121; Hazard *v.* Smith, 21 Vt. 123; Simpson *v.* Fullenwider, 12 Ired. 338.

(*f*) Ellis *v.* Warnes, Cro. Jac. 33, Yelv. 47; Powell *v.* Waters, 8 Cowen, 669; Brown *v.* Waters, 2 Md. Ch. 201; Aldrich *v.* Reynolds, 1 Barb. Ch. 43; Wales *v.* Webb, 5 Conn. 154. In Cuthbert *v.* Haley, 8 T. R. 390, Haley procured Plank to discount certain notes of his at a usurious rate. The plaintiffs received the notes from Plank *bona fide*, and the defendant being applied to by them for payment, executed to them a bond for the amount of the notes, upon which bond this action was brought. It was held, that it could be maintained. Lord *Kenyon*, C. J., said: "The construction that has already been put on the statutes, has been, in a variety of instances, abundantly hard. The courts have said, and rightly so, that the innocent holders of securities given on usurious considerations, must suffer for the wickedness, or rather unlawfulness, for it has been said that usury is only *malum prohibitum*, and not *malum in se*, of the original parties to the transaction. But this is an attempt to carry that doctrine much further than any prior case, and further than policy or the words of the act of parliament require; and if it were to succeed, it might effect most of the securities in the kingdom; for if in tracing a mortgage for a century past, it could be discovered that usury had been committed in part of the transaction, though between other parties, the consequence would be that the whole would be void. It would be a most alarming proposition to the holders of all securities. I admit that the securities themselves that are tainted with usury cannot be enforced in a court of justice, even though they be in the hands of innocent purchasers for a valuable consideration, without notice. . . . And therefore the plaintiffs in this case could not have maintained any action on the notes given by the defendant to Plank. But the notes were destroyed after they got into the hands of the plaintiffs, and the bond in question was given to them, they not knowing of the usury between Plank and the defendant. I admit that, if one security be substituted for another, by the parties, in order to get rid of the statute against usury, the substituted, as well as the original security will be void; but it is not pretended that that was the case here." *Kent*, C. J., holds similar language, in Jackson *v.* Henry, 10 Johns. 195.

(*g*) Thatcher *v.* Gammon, 12 Mass. 268; Thompson *v.* Berry, 3 Johns. Ch. 395, 17 Johns. 436. See also, Jackson *v.* Henry, 10 Johns. 196; Jackson *v.* Bowen, 7 Cowen, 20; Day *v.* Cummings, 19 Vt. 496.

(*h*) Wright *v.* Wheeler, 1 Camp. 165, note. This was an action on a bond to which usury was pleaded. A bond had been given for the loan of money with lawful interest, but the defendant also

Some difficulty may arise in determining when the usurious character of the original security shall attach itself to the substituted security. If A gives B a usurious note, he may waive the defence and pay the note; and if he pays it in bank-bills, these of course are good in the hands of any honest holder to whom B transfers them. If A happens to have a good note of C, and transfers it to B in payment, is not this equally good in the hands of B's indorsee? Or if A procures for this purpose the note of C, whose note B has expressed himself willing to accept, this note being not usurious in itself, and C not knowing the original usury, would not this note be good in the hands of B's indorsee, or assignee? We should say that it would be; because, we think, on principle, that no contract should be held void for usury, unless the borrower, for usury, was a party to it; or unless it is given as collateral security for a present subsisting usurious contract. (*i*) It has been said, very forcibly, if one

agreed to give plaintiff a salary of 50*l.* per year as a clerk in his brewery. It was not intended that the plaintiff should render any service, but the salary was a mere shift to give the plaintiff more than 5*l.* per cent. for his money. After one year's salary had been paid under the agreement, the parties agreed that it should be deducted from the principal, the original deed cancelled, and a fresh bond taken for the remaining principal and legal interest. This was done, and on the second bond the action was brought; *Lawrence*, J., said: "The act of parliament only makes void contracts whereby more than five per cent. is secured. The original contract between these parties was certainly usurious, and no action could have been maintained on the first bond; but there was nothing illegal in the last bond; it was not made to assure the performance of the first contract, nor does it secure more than five per cent. interest to the plaintiff. The parties saw they had before done wrong, they rectified the error they had committed, and substituted for an illegal contract one that was perfectly fair and legal. I see no objection to their doing that, and am therefore of opinion that the present action is maintainable." The principle of the above decision is abundantly sustained in the following American cases: De Wolf *v.* Johnson, 10 Wheat. 367; Chadbourn *v.* Watts, 10 Mass. 121; McClure *v.* Williams, 7 Vt. 210; Hammond *v.* Hopping, 13 Wend. 505; Miller *v.* Hull, 4 Denio, 104; Bank of Monroe *v.* Strong, 1 Clarke, Ch. 76; Fowler *v.* Garret, 3 J. J. Marsh. 681; Postlethwait *v.* Garrett, 3 T. B. Mon. 345; Cummins *v.* Wire, 2 Halst. Ch. 73.

(*i*) In Turner *v.* Hulme, the plaintiff arrested the maker of a note to him, which was clearly void on the ground of usury. The defendant in this action represented to the plaintiff that he could not recover on the note, the consideration being usurious, but the plaintiff refused to liberate the maker of the note unless the defendant would join in a note to the amount of the maker's debt, which the defendant did, and upon that note this action was brought. It was contended that the second note was tainted by the original usury. "But Lord *Kenyon*, on this being re-opened, intimated his clear opinion to the contrary; he said that Banks, when the first note had been put in writ, by Turner, against him, should have resisted and defended himself on the ground of usury; but that the consideration of that note could not be questioned in the present action, unless it could be shown that this was a colorable shift to evade the statute against usury, devised when the money was originally lent, and the first note granted." In Marchant *v.* Dodgin, 2 Moore & S 632, an

chooses not to avail himself of the defence of usury, but to pay a usurious debt, and pays it by delegating a debtor to himself to pay this debt, it ought not to be in the power of this delegated debtor to insist upon the original defence, and avail himself of a usury by which he was not affected. (*j*) So, at least, it seems to be held in the case of a usurious mortgagee, where the land, subject to such a mortgage, is conveyed to a third party; for the grantee cannot hold his land clear of the first mortgage debt by denying the right of the mortgagee, on the ground of usury. (*k*) Indeed it would seem that none but parties or privies can take any advantage of this defence, or this defect in a contract. For while a subsequent mortgagee cannot relieve himself from the former mortgage, by showing its usurious nature, a guarantor of a debt is so far connected with the contract that he may avail himself of the defence of usury. (*l*)

SECTION VI.

DISTINCTION BETWEEN INVALIDITY OF THE CONTRACT, AND THE PENALTY IMPOSED.

The law affects a usurious contract with two consequences, which should be discriminated. One is, the avoidance of the

action was brought against the defendants, acceptors of a bill of exchange, drawn by Taylor, by him indorsed to Daniel, and by Daniel to plaintiff. Taylor testified that certain other bills had been accepted by defendant, for his accommodation, and usuriously discounted by the plaintiff. One of these bills being due, the bill sued upon was accepted by the defendants, in order to enable Taylor, by its discount, to meet the former bill, which he did, and no usury was proved as to this bill. A rule for setting aside a verdict for the plaintiff, being moved for, *Tindal*, C. J., said: "The bill upon which the action was brought was not a continued bill, given in substitution of the former acceptance of the defendants, but was given merely for the purpose of raising money to meet the second bill." *Bosanquet*, J., said: "It does not appear from the evidence that the third bill was given in substitution of the second, so as to be affected by what passed on the discount of it." The rule was refused. In Stanley *v.* Kempton, 30 Me. 118, Butler held three notes against Bangs, which were usurious. Bangs being called upon to pay, procured the defendant to give the note in suit, in payment of the three original notes, which were given up. The court held the last note to be a payment, and not a substitute for the other notes, and therefore valid.

(*j*) *Jackson*, J., Bridge *v.* Hubbard, 15 Mass. 103; Bearce *v.* Barstow, 9 Mass. 45.

(*k*) Green *v.* Kemp, 13 Mass. 515; Mechanics Bank *v.* Edwards, 1 Barb. 271; Sands *v.* Church, 2 Seld. 347. See also, Stoney *v.* Amer. Life Ins. Co. 11 Paige, 635.

(*l*) Huntress *v.* Patten, 20 Me. 28; Harrison *v.* Hamel, 5 Taunt. 784; Gray *v.* Brown, 22 Ala. 273.

contract; the other is, the penalty for the breach of the law. Now the penalty is not incurred until usurious interest be in some way paid or received; although the contract may be avoided for this cause, at any time; and it is sometimes a very difficult question, at what time, or by what act, the usury is completed. (*m*) Although an original contract for the use of

(*m*) Clark *v.* Badgley, 3 Halst. 233; Thomes *v.* Cleaves, 7 Mass. 361; Oyster *v.* Longnecker, 16 Penn. St. 274; Livingston *v.* Indianapolis Ins. Co. 6 Blackf. 133; Upson *v.* Austin, 4 Ala. 124; Kirkpatrick *v.* Houston, 4 Watts & S. 115; Bank of U. S. *v.* Owens, 2 Pet. 527; Hodges *v.* Lovat, Lofft, 50. Fisher *v.* Beasley, Doug. 235, was an action of debt, to recover the penalty for taking usurious interest. One Grindall had borrowed £100 of the defendant, for which he had given a bond, for the payment of the principal and interest, at the rate of £5 per cent. at the end of six months. He also paid two guineas to the defendant, as a premium, at the time when the money was advanced. At the end of the six months, the £100 was repaid, and £2 10*s*. for interest. This action was brought within a year after the payment of the capital and interest, but more than a year after the two guineas were paid and the money advanced, and the question was, whether the action was barred by not being brought within a year after the offence of usury was committed. The cases of Lloyd *v.* Williams, 2 W. Bl. 792, and Mallory *v.* Bird, cited in Cro. Eliz. 20, were referred to for the defendant, in which latter case, it is said: "If one contracts to have twenty pounds for the loan of a hundred pounds, if he taketh nothing of the twenty pounds he is not punishable by the statute, but if he taketh any thing, if but one shilling, this is an affirmance of the contract, and he shall render for the whole contract." But *Buller*, J., said, that the answer given by *Astor*, J., to that case, when it had been cited on some former occasion was, that it meant one shilling above the legal interest. Lord *Mansfield* said: "It became material in this case to determine when the usury was complete. One side contended, that it was so upon the payment of the premium, and I long inclined to that opinion, because it was paid *eo nomine* as above legal interest. But I am now satisfied, as we all are, that the offence was not complete till the half year's interest was received. There are two branches of the statute. Under the first, every agreement, contract, and security, for more than legal interest, is void. Therefore the bond given to the defendant in this case was void. But under the second, the penalty is incurred only by *taking*, *accepting*, and *receiving*, more than legal interest. All the authorities lean this way, both ancient and modern. In Lloyd *v.* Williams, more than legal interest had been paid at first." Maddock *qui tam v.* Hammett, 7 T. R. 184, was an action on the statute, the usury alleged being the discount of a note for £1,000. But the point on which the case turned was, that on the day when the note became due, the maker discharged it by giving another note, which included the amount due upon the first note, and a further sum advanced by the defendants, which last note was outstanding and unsatisfied at the trial of this case. *Buller*, J., at *nisi prius*, was of the opinion that usury had not been committed, no *money* having been received by the defendant, and Lord *Kenyon*, C. J., delivering the opinion of the court, upon a motion to set aside the nonsuit, said: "The objection here is, that nothing has been received by the defendants, either for interest or principal, except a paper security, which, till it has been paid, is no payment whatever, and may ultimately turn out to be worth nothing. The plaintiff says that it was given for the first note, which was given on a usurious contract; if so, the second note is also bad. But the plaintiff cannot be permitted to contend both ways; that it is good, because given in payment of the first note; and bad, because that first note for which it was given in discharge was bad. It is true that a payment, either in money or money's worth, would be sufficient; and it shall not be permitted to a party who has knowingly received any thing, *as interest*, to apply it afterwards to another account, as he finds it convenient. But here the defendants have not received any thing; and therefore I am of opinion

money be free from the taint of usury, and consequently can be enforced, yet if usurious interest be actually paid upon it after-

that the direction of the learned judge at the trial was right." In Pearson *v.* M'Gowran, 3 B. & C. 700, 5 Dowl. & R. 616, the venue, in an action of debt for penalties, was laid in Middlesex, and the offence was alleged to be that usurious interest was secured to the defendant, by a bill of exchange accepted and afterwards paid by a person named Bottril. On the trial it appeared, that the contract was made and the acceptance given in Middlesex, but that the bill was paid in London, to the holders, to whom the defendant had indorsed it. *Abbott*, C. J., delivering the opinion of the court, referred to the statute providing that any person taking, accepting, or receiving above £5 per cent. interest, should forfeit the treble value of the moneys lent, and providing that the forfeiture should be sued for in the county where the offence was committed, and said (5 D. & R. 619), "Then the only question is, what is the offence? We think it consists in taking, accepting, and receiving usurious interest. The corrupt contract precedes and forms no part of the taking, therefore the offence here was not committed partly in Middlesex and partly in London, and the only materiality of the contract is to show the real nature and consequent illegality of the taking. . . We are of opinion that the venue in this case ought to have been laid in London, and not in Middlesex." And in Simpson *qui tam v.* Warren, 15 Mass. 460, where the defendant had discounted a note for \$400, at the rate of two per cent. per month, which was unpaid at the time this action for the penalties was brought, it was held that no usury had been committed. *Parker*, C. J., said: "The whole sum loaned was not paid over, but the balance, after deducting the discount, so that in fact four hundred dollars were never lent, as stated in the declaration, but a less sum, for which the borrower promised to pay four hundred dollars, which was the principal lent and the excessive interest. The defendant has then received nothing, either principal or interest, and therefore he cannot be liable for the penalty." Wright *v.* Laing, 3 B. & C. 165; Stevens *v.* Lincoln, 7 Met. 525, are to the same effect. See also, Scurry *v.* Freeman, 2 B. & P. 381. But if a sum more than equal to the legal interest upon the sum substantially loaned or forborne, be received, the offence of usury is complete, whether the principal be repaid or not. In Wade *qui tam v.* Wilson, 1 East, 195, £600 being due from G. to the defendant, 10 guineas were paid by G. to the defendant, by way of premium, for the defendant's forbearance for one year, and G. executed his note to the defendant for £600 at £5 per cent. A half year's interest of £15 was afterwards received by the defendant, upon the note, and it was held that upon this payment usury was committed. Lord *Kenyon* said: "Here the party having ten guineas premium in hand, and interest accruing from day to day, actually received interest *qua* interest for half a year, which made what he received upon the whole, amount to more than lawful interest for that time, upon the sum lent." *Lawrence*, J., said: "Here, then, is a premium paid of ten guineas, at first, which was to run through the whole year, and interest accruing daily on the principal sum, the defendant actually received interest for the first half year, which, together with what he had before received by way of premium, amounts to more than legal interest. That immediately constituted usury." *Le Blanc*, J., said: "I am of opinion that at least one moiety of the premium is to be apportioned to the half year's interest which was received, and that the true spirit of the agreement was, that the premium was to run through the whole year, in proportion as the interest accrued, and therefore, upon the whole, I think the contract proved sustains the count, and that the usury was complete when the first half year's interest was paid." In Lloyd *qui tam v.* Williams, 2 W. Bl. 792, Hinchliffe borrowed £100 for three months, of the defendant, which he received, and paid the defendant thereout £6 5*s.* by way of interest, in advance, and gave the defendant his note for £100 payable in three months. *De Grey*, C. J., and *Blackstone*, J., a majority of the court, held that the offence of usury was consummated and completely committed on making the corrupt agreement, and receiving the interest in advance. In Commonwealth *v.* Frost, 5 Mass. 53, the defendant had loaned money to Ebenezer Clough, on a note for \$200, in ninety days, paying him \$187, having retained \$13 for the ninety days' interest. At the expiration of the term, another note for the same amount

wards, the penalty is incurred. (*n*) And if the usurious interest is payable at intervals, the penalty is incurred by the first payment and receipt; (*o*) but it would seem that no more than one penalty can be incurred upon the same loan, although further instalments continue to be paid. (*p*)

was given, Clough paying fourteen dollars in cash, for the extension of the time ninety days longer. This note was also renewed for ninety days, and sixteen dollars paid by Clough on its renewal, for the reception of which last interest the defendant was indicted. The court said it was clear "that the taking of the sixteen dollars, as the compensation for the loan, that sum exceeding lawful interest, completed the offence of usury, whether the principal sum was ever paid or not." There has, however, been a tendency to consider, in contracts of this last nature, the money actually received by the borrower as the amount of the loan; and although the securities given are for an amount sufficiently more than the sum received, to make the contracts usurious, if the legal per cent. of interest is paid thereon, not to consider the offence of usury complete until a payment of such interest is made. This was the view *Gould*, J., was inclined to take, in Lloyd *v.* Williams, *supra;* and in Scurry *v.* Freeman, 2 B. & P. 381, in which the defendant lent Robert Hooley £500 upon security given for that amount, who, a previous agreement having been made that something more than legal interest should be paid, but no particular sum having been agreed upon, offered the defendant back £50, which he directed to be given to his son, the court (consisting of *Heath*, *Rooke*, and *Chambre*, judges) were very clearly of opinion that the receipt afterwards of £25, as one year's interest upon the debt, was usurious, so that an action under the statute within one year after its reception would lie, inasmuch as the loan could only be deemed a loan of £450, since the defendant had taken back £50 out of the £500. So also, *Gibson*, C. J., in Oyster *v.* Longnecker, 16 Penn. St. 274, says, there is a distinction between interest and a bonus; and that a return of part of the sum on which interest is reserved, reduces the contract essentially to a loan of the residue, and that therefore the offence of usury is not committed until interest has actually been paid upon the sum reserved as the debt. But the better opinion would seem to be, that such agreements are usurious whenever more than the legal interest on what is understood by the parties as the principal debt, is paid, since the statute of Anne declares it shall be usury to receive more than five pounds per cent. for forbearing or *giving day of payment;* so that, as Mr. Justice *Blackstone* remarked, in Lloyd *v.* Williams, "interest may as lawfully be received beforehand for *forbearing*, as after the term is expired, for *having forborne;*" and if in either case more than five per cent. is taken, usury is committed. See remarks of *Bayley*, J., in Wood *v.* Grimwood, 10 B. & C. 699.

(*n*) Gardner *v.* Flagg, 8 Mass. 101; Thompson *v.* Woodbridge, id. 256; *Sewall*, J., Chadbourn *v.* Watts, 10 Mass. 124. In Sir Wollaston Dixie's case, 1 Leon. 95, *Gent*, B., said: "If I lend one a hundred pounds without any contract for interest, and afterwards, at the end of a year, he gives me £20 for the loan thereof, the same is within the statute, for my acceptance makes the offence without any bargain or contract." In Floyer *v.* Edwards, Cowp. 114, Lord *Mansfield* said: "In case the agreement originally for the payment of principal be legal, and the interest does not exceed the legal rate, but afterwards, upon payment being forborne, illegal interest is demanded, there the agreement by retrospect, is not void, but the parties are liable to the penalty of treble value." See also, Radley *v.* Manning, 3 Keble, 142, pl. 13; Lord *Mansfield*, in Abrahams *v.* Bunn, 4 Burr. 2253, and previous note.

(*o*) Wade *v.* Wilson, 1 East, 195; Wood *v.* Grimwood, 10 B. & C. 689.

(*p*) In Wood *v.* Grimwood, 10 B. & C. 696, in which a bonus had been paid, and afterwards a half year's interest, which, together with the bonus paid, constituted more than the lawful interest, and subsequently legal interest was paid half yearly, on the original debt, it was decided, that the offence of usury was complete when the first half-yearly payment was made; that the bonus was not to be apportioned throughout the whole time of the loan. So that an action brought for penalties, at

Where the statute makes a usurious contract void, or forfeits a part of the principal or legal interest, by way of penalty, the creditor of course must lose this, for the debtor may interpose this defence, however inequitable it may be. But if the debtor make himself a plaintiff, and seek relief against a contract for its usury, it is held, in equity, that he must pay or tender the whole amount of principal and legal interest. (q) It was once

any time within one year after the payment of any half year's interest, could be maintained, as being in time. And it was doubted whether, even if such bonus was apportionable, the only offence for which the lender could be prosecuted had not been committed upon the reception of the first half year's interest. *Parke*, J., said: "I am of opinion that the moment one penalty was incurred, upon one bargain or loan, no other offence could be committed in respect of the same bargain or loan, by reason of the lender having received a further sum, by way of usurious interest. The statute of 12 Anne, st. 2, c. 16, enacts: 'That all persons who shall, upon any contract, take, accept, and receive, by way or means of any corrupt bargain, loan, &c., for the forbearing or giving day of payment, for one whole year, of or for their money, above the sum of £5 for the forbearing of £100 a year, and so after that rate, shall forfeit and lose, for every such offence, the treble value of the moneys lent,' &c. The statute therefore requires two things to constitue the offence; a corrupt bargain, and an actual taking of a higher rate of interest than 5 per cent. for forbearing or giving day of payment for one whole year. As soon as these two things concur, the offence contemplated by the statute is completed. The party who has received the usurious interest in respect of the corrupt bargain, then incurs the penalty, and I think *the only* penalty, attached by the statute to that corrupt bargain, and the receipt of usurious interest thereon, by forfeiting treble the value of the moneys lent or forborne. If it were otherwise, and each subsequent payment of the legal interest should constitute a distinct offence of usury, where a premium has been given, the consequence would be, that if a party took legal interest for such a loan, at intervals, he would be liable to forfeit treble the amount of the moneys lent, not merely once, but each time he received the interest; and if those intervals were short, penalties to the amount of many thousands might be incurred by a loan of a single £100. This never could have been the intention of the legislature. I think it must have meant, that no more than three times the amount of the money lent could ever be forfeited by the offender." But in Lamb *v.* Lindsey, 4 Watts & S. 449, this question was directly decided in an opposite way. Money was loaned at usurious interest, the device of the sale of property and a lease back, being adopted, to disguise the transaction. The rent, amounting to 15 per cent. upon the money loaned, was regularly paid, and the present *qui tam* action was brought, more than a year from the first payment, and within a year from the last. A majority of the court held the action maintainable, deciding that the penalty of a forfeiture of "the money and other things lent," was incurred at each time when the lender received more than the legal interest. Mr. Justice *Kennedy*, however, delivered a dissenting opinion, in which he vindicates his own opposite ruling at *nisi prius*, and adopts the same view taken by Mr. Justice *Parke*, *supra*, although the case of Wood *v.* Grimwood was not cited in the case.

(q) Scott *v.* Nesbit, 2 Brown, Ch. 641, 2 Cox, 183; *Ex parte* Skip, 2 Ves. Sen. 489; Benfield *v.* Solomons, 9 Ves. 84; Rogers *v.* Rathbun, 1 Johns. Ch. 367; Tupper *v.* Powell, id. 439; Fanning *v.* Dunham, 5 Johns. Ch. 122; Fulton Bank *v.* Beach, 1 Paige, 429; Morgan *v.* Schemmerhorn, id. 544; McDaniels *v.* Barnum, 5 Vt. 262; Jordan *v.* Trumbo, 6 Gill & J. 103; Thomas *v.* Mason, 8 Gill, 1; Anonymous, 2 Desaus. 333; Stone *v.* Ware, 6 Munf. 541; Shelton *v.* Gill, 11 Ohio, 417; Day *v.* Cummings, 19 Vt. 496; Ballinger *v.* Edwards, 4 Ired. Eq. 449; Phelps *v.* Pierson, 1 Iowa, 121; Wilson *v.* Hardesty, 1 Md. Ch. Dec. 66. In Hindle *v.* O'Brien, 1 Taunt. 413, the defendant had given the plaintiff, for various sums borrowed of him, bills and notes with usurious premiums. The

an established rule, that there is no way in which the debtor can ask relief at law, except collaterally. He must wait until he is sued, before he can raise directly the question of his right to this defence, and then this defence is given and measured by the statute. But if he, for example, brings trover for goods pledged, to secure a debt for which a note with usurious interest was given, and seeks to get the value of his goods without deducting his debt, on the ground that the note is void, it might be said to him, on high authority, that the note may be void, but that is not now the question; for he owes money, and has pledged goods, and must pay his debt to redeem them. (*r*) But this doctrine has been attacked, and perhaps overthrown in England, and may be doubted here. (*s*) So, if he has paid money on a usurious contract, and sues for its repayment, it seems that he will recover so much as he has paid usuriously, (*t*) but no more; that is, he will not recover the legal interest, which he has paid on a usurious contract. Courts were at first inclined to deny the right of a party paying usurious interest, to recover back any portion of the money so paid, on the ground that both parties to such a transaction were *in pari delicto*, and the party paying the money parted with it freely, so that the maxim *volenti non fit injuria* would apply. (*u*) But this is not so now, the rule being that above stated; and the distinction has been taken between statutes enacted on general

parties at length stated an usurious account, and the defendant gave new bills, and a warrant of attorney to confess judgment, and the old bills and notes were given up. Upon the defendant's failure to pay an instalment of the new bills, the plaintiff entered up judgment on the warrant of attorney, and sued out execution. Upon an application to set aside the judgment, the court did so only upon the terms that the defendant should repay the principal and legal interest due, which was ordered to be ascertained by a prothonotary. But in Roberts *v.* Goff, 4 B. & Ald. 92, upon an application to set aside a judgment obtained under a warrant of attorney, and to have the warrant of attorney delivered up, on the ground of usury, the court refused to impose the terms that the party should pay the money actually advanced with legal interest. *Bayley*, J., said: "We cannot impose such terms. The instrument is void. It is not good at law." Under the construction put upon the Virginia statute of usury, it seems that the debtor need only pay the principal debt, without any interest. Young *v.* Scott, 4 Rand. 415; Clarkson *v.* Garland, 1 Leigh, 147; Turpin *v.* Povall, 8 Leigh, 93; Marks *v.* Morris, 4 Hen. & M. 463. See also, Boone *v.* Poindexter, 12 Smedes & M. 640.

(*r*) Fitzroy *v.* Gwillim, 1 T. R. 153.

(*s*) Tregoning *v.* Attenborough, 7 Bing. 97, 4 Moore & P. 722; Hargreaves *v.* Hutchinson, 2 A. & E. 12; Ramsdell *v.* Morgan, 16 Wend. 574.

(*t*) Bosanquet *v.* Dashwood, Cases *temp.* Talbot, 38, per Lord *Mansfield*, Browning *v.* Morris, Cowp. 793.

(*u*) Tomkins *v.* Bernet, 1 Salk. 22.

grounds of policy and public expediency, in which each party violating the law is *in pari delicto*, and entitled to no assistance from a court of justice, and those laws enacted to protect weak or necessitous men from being overreached, defrauded, or oppressed, in which event the injured party may have relief extended to him, and the whole purport and reason, both of the law of usury, and of the great mass of decisions under it, indicate, that the lender on usury is regarded as the oppressor and the criminal, and the borrower as the oppressed and injured. (*v*)

SECTION VII.

OF CONTRACTS ACCIDENTALLY USURIOUS.

If a contract is accidentally usurious, that is, made so by some mistake in calculation, or other error in fact, against the intention of the parties, the mistake may be corrected, and the contract saved. (*w*) But if, in fact, a greater rate of interest is

(*v*) Clarke *v.* Shee, Cowp. 197; Browning *v.* Morris, Cowp. 790; Bosanquet *v.* Dashwood, Cases *temp.* Talbot, 38; Wheaton *v.* Hibbard, 20 Johns. 292; *Beardsley*, C. J., Schroppel *v.* Corning, 5 Denio, 240.

(*w*) Anonymous, 1 Freem. 253, pl. 268. It was said, by *North*, C. J., that "if a scrivener, in making a mortgage, &c., do, through mistake, make the money payable sooner than it ought to be, or reserve more interest than ought to be, this will not make it void within the statute, because here was no corrupt agreement." See also, Nevison *v.* Whitley, Cro. Car. 501, W. Jones, 396; and Buckley *v.* Guildbank, Cro. Jac. 678. Glasfurd *v.* Laing, 1 Camp. 149, was an action on a bill of exchange for £3,180, the defendants resisted the action, on the ground of usury, and showed that the parties for whom the defendants accepted, being indebted to the plaintiff in St. Kitts, for £6,000, with six per cent. legal interest there, agreed with the plaintiff in England, that the principal should be paid by two bills of exchange, one in twelve months and the other in two years; and accordingly, the present bill for £3,180, and another for £3,360, were drawn, but that, according to the legal rate of 5 per cent. interest in England, the bills should have been for only £3,150 and £3,300. The plaintiff's agent, however, swore that the increased amount arose from an oversight of his; that having been called upon to calculate the sum due on the debt, for which the bills were to be drawn, after calculating the amount due on the original debt, at 6*l.* per cent., as permitted in the West Indies, he inadvertently calculated the interest to grow due in England, at the same rate. Sir *James Mansfield*, C. J., held, that the action might clearly be maintained for the sum *bona fide* due, as the excess in the amount of the bill had arisen from a mere mistake, and no intention to take usury could, at any rate, be imputed to the plaintiff. See also, Gibson *v.* Stearns, 3 N. H. 185; Livingston *v.* Bird, 1 Root, 303; *McLean*, J., Lloyd *v.* Scott, 4 Pet. 224; McElfatrick *v.* Hicks, 21 Penn. St. 402; Marvine *v.* Hymers, 2 Kern. 223.

taken than the law allows, by reason of an erroneous opinion of the lender that he had a right to this interest, this is a mistake of law, and, agreeably to the general rule, will not excuse the lender, and the whole effect of usury will attach to the contract. (x)

The question has been very much discussed, whether banks, or other money-lenders, or bill or note discounters, have a legal right to adopt, as a principle of calculation, the rule that gives rather more that legal interest upon notes discounted, or to which the interest is added, in case of fractional portions of years and months. Rowlett's Tables, which are calculated mainly on the supposition that a year consists of 360 days, gives this advantage to the lender. The use of these tables, or of a similar principle of calculation, is very general, not to say universal. And although this practice is, strictly speaking, usurious, and there is much conflict in the authorities, we have no doubt that the prevailing rule of law sanctions this practice,

(x) Marsh *v.* Martindale, 3 B. & P. 154; Maine Bank *v.* Butts, 9 Mass. 49. This was an action brought by the bank, to recover possession of certain premises mortgaged to them by the defendant, to secure several notes given by him to the bank. The defendant alleged, that on the date of mortgage deed, the plaintiff loaned him $10,000, and that it was agreed between them that more than 6 per cent. interest should be paid upon the loan, and that the notes secured by the mortgage were given to secure such principal and illegal interest, and therefore he pleaded the statute of usury. It appeared, upon the trial, that there had been a forbearance of 10,000 dollars by the bank, and that the interest secured in the mortgage was more than 6 per cent. upon the 10,000 dollars; but it was proved that the excess had arisen, not from a direct reception by the bank of more than 6 per cent. upon any notes, but by reason of the defendant's having, in order to meet notes for 63 days, at the times they became due, procured new loans, a week previous to the expiration of the time of credit given for the former loans, giving new notes therefor; and it was contended, that although the money thus received amounted to more than 6 per cent. upon the original debt, for the reason that the bank retained the amount of the new notes until the old notes became due, for the purpose of meeting them, yet, that as no more than the usual profits upon loans made on banking principles were received, such agreements were not usurious. But the court decided, that no banking company, any more than an individual, had authority to make a discount or loan, at a greater profit than 6 per cent. interest, nor was exempt from the restrictions of the statute against usury. And *Sewall*, J., said: "It is probable that in this case there was no intentional deviation on the part of the bank; but a mistake of their rights. This, however, is a consideration which must not influence our decision. The mistake was not involuntary, as a miscalculation might be considered, where an intention of conforming to the legal rule of interest was proved; but a voluntary departure from the rate. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged, in this respect, to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement; for ignorance of the law will not excuse." See also, Childers *v.* Deane, 4 Rand. 406.

where it is adopted, merely as a convenience, and in conformity to usage (*y*)

(*y*) In New York Firemen Ins. Co. *v.* Ely, 2 Cowen, 678, a note for 90 days, indorsed by the defendants, was the cause of action; it was given for two others, which in turn were a renewal of others. Some of the previous notes had been payable at 90 days, and all the notes had been discounted by the plaintiffs, at 7 per cent., and the discount deducted in advance. The secretary of the company testified that his practice had been to cast interest, considering 30 days the 12th of a year, 60 days the sixth, and 90 days the fourth of a year, and to cast interest at 7 per cent. (the lawful rate) accordingly. The three days of grace he called one tenth of a month. The question was whether the note sued upon was usurious, and it was decided to be so. The court say: "It must be conceded, that more than seven per cent. per annum was received upon the discount of the note, in this case. How is the presumption of law, that it was received in pursuance of a corrupt agreement, sought to be repelled? Not by showing that the sum paid for interest was greater than the parties intended should be paid; that there was a mistake in telling the money; or that the clerk who cast the interest, had fallen into an arithmetical error; but by showing that the excess arose from the adoption of a principle of calculation, which the parties knew would give more than seven per cent., though they believed it was not a violation of the statute. In other words, the plaintiffs received more than seven per cent., because they believed that they had a legal right to receive more. If they judged erroneously, it was a mistake in point of law, and not in point of fact; and unless there be something in the case of usury to distinguish it from all other cases, their ignorance or mistake in relation to the law, can afford them no protection." And after examining the cases upon the subject, the court concluded that the mistake of the parties did not prevent the contract from being usurious, as matter of law, and its consequences from resulting. The same view is taken in Utica Insurance Co. *v.* Tillman, 1 Wend. 555; Bank of Utica *v.* Wagar, 8 Cowen, 398; State Bank *v.* Cowan, 8 Leigh, 253. On the other hand, see Lyon *v.* State Bank, 1 Stewart, 442; Planters Bank *v.* Snodgrass, 4 How. (Miss.), 573; Duval *v.* Farmers Bank, 7 Gill & J. 44; Duncan *v.* Maryland Savings Institution, 10 Gill & J. 299; Bank of St. Albans *v.* Scott, 1 Vt. 426; Agricultural Bank *v.* Bissell, 12 Pick. 586. In this last case the cashier of the bank took $21 as the interest of $2,000 for sixty-three days. *Shaw*, C. J., said: "That this sum a little exceeds 6 per cent. for one year, as fixed by statute, is very obvious. If this were done with design, and with the intent of taking more than the lawful interest, or if done in pursuance of the adoption of a principle of computation, which would give more than the legal rate, we are not prepared to say that it would not be usurious, however small the excess over the legal rate. But, as the statute prescribes the rate of interest for *one year*, and so at the same rate, for a longer or shorter time, it is obvious, that when the interest is to be computed in days or months, it is impossible to follow the prescribed rule precisely, without taking the fraction of a day; and that this is not required, is now settled by the whole current of authorities. From the impossibility of executing the statute with literal exactness, has resulted the necessity of resorting to an execution *cy pres*, in many cases where it is intended to conform to the intent and spirit of the statute. So it has been the practice to consider a contract for money payable in months, to be payable in calendar months, and to consider a calendar month as the twelfth part of a year, and compute interest accordingly, though they are of different lengths. A note given in February, at two months, will have 57 days to run, and pay one per cent. interest, as for the sixth part of a year; but a note given in December, at two months, will have 62 days to run, and pay the same rate of interest. The same difficulty arises, in computing interest for a small number of days; and therefore some approximation, which can be made by an easy and practicable mode of computation, if made in good faith and without being intended as a cover for usury, has been considered allowable, without drawing after it the penalty of the statute. Such being the universal practice, of other persons as well as banks, we think a jury would not be warranted, from the mere fact that the interest thus computed slightly exceeds the legal rate, to infer a corrupt and usurious agreement.

SECTION VIII.

OF DISCOUNT OF NOTES AND BILLS.

The practice of discounting bills or notes, by deducting from their face the interest for the whole time they had to run, began with our banks, and was soon so firmly established, that i was sanctioned by the courts, almost of necessity. But this practice is, in itself, certainly usurious, for the borrower has the use of the amount of the note, minus the interest, and pays interest for the whole amount. Having been sanctioned in respect to corporations whose business it was to lend money, a distinction could not be made against individuals who lent money; and it may now be considered as settled, rather for the sake of convenience than upon principle, that it is not usurious to take the interest in advance, by way of discount, although it is obvious, that by carrying this principle far enough, any amount of excessive interest may be taken. Thus, if the legal interest were six per cent., and a note for a thousand dollars had ten years to run, the borrower would receive four hundred dollars, and at the end of ten years, pay six hundred for the use of it, or sixty dollars a year for the use of four hundred which is obviously much more than even compound interest There seems, however, to be a strong disposition to limit this practice to short paper, or at least not to apply it to long loans or discounts, although nothing like a fixed rule or standard can be found, either in the authorities or in the usage, and it must often be difficult to apply such a distinction. (*z*) It seems

And we think the present case comes within this rule. The intent was to compute and receive the interest for 60 days and grace. The grace is a regular portion of the time the note has to run, and the bank had a right to compute and receive interest for it. The period of sixty days is one sixth of a year, as nearly as can be computed without a fraction; and three days is the nearest approximation to the 10th part of a month, or the 120th part of a year, without fractions of a day. Upon this view of the case, we are of opinion, that it is not shown that usurious interest was taken, contrary to the provisions of the statute, and that the defence is not sustained."

(*z*) See Barnes *v.* Warlich, Cro. Jac. 25, Yelv. 31, and Grysill *v.* Whichcott, Cro. Car. 283; Caliot *v.* Walker, 2 Anst. 496; Eaton *v.* Bell, 5 B. & Ald. 40; Mowry *v.* Bishop, 5 Paige, 98; Marvine *v.* Hymers, 2 Kern. 223.

originally to have been doubted, whether the receipt of interest quarterly or semiannually was not usurious, on the ground that the lender received thereby more than the legal rate *by the year*. And for a considerable time those contracts were considered usurious, upon which the legal interest was deducted from the sum loaned, or paid in advance. (*a*) But the practice is now universal, both in England and in this country. The authorities, however, which sustain this departure from the accurate enforcement of the usury laws, seem mainly to rest upon the principle, that the additional sum received by the lender may be considered in the nature of a compensation for his services and trouble. And all the decisions show, that such anticipated reception of interest must be confined to cases where a bill or note is given by the borrower, and does not extend to any ordinary private agreement of loan. (*b*)

(*a*) In Anonymous, Noy, 171, usury was pleaded to an action upon a bond. *Popham*, J., said: "If a man lend £100 for a year, and to have £10 for the use of it, if the obligor pays the £10 twenty days before it is due, that does not make the obligation void, because it was not corrupt. But if, upon making the obligation, it had been agreed that the £10 should have been paid within the time, that should have been usury, because he had not the £100 for the whole year, when the £10 was to be paid within the year." And verdict was given accordingly.

(*b*) In N. Y. Firemen Ins. Co. *v.* Ely, 2 Cowen, 703, the principle extracted from the cases, by *Sutherland*, J., in which the whole court seem to have concurred, was this: "The taking of interest in advance, is allowed for the benefit of trade, although, by allowing it, more than the legal rate of interest is, in fact, taken; that being for the benefit of trade, the instrument discounted, or upon which the interest is taken in advance, must be such as *will*, and usually does, circulate or pass in the course of trade. It must, therefore, be a negotiable instrument, and payable at no very distant day; for without these qualities it will not circulate in the course of trade. Under these limitations, the taking of interest in advance, either by a bank, or incorporated company without banking powers, or an individual, is not usurious." In Marsh *v.* Martindale, 3 B. & P. 154, the defendants were acceptors of a bill of exchange for £5,000, drawn by Robert Wood, payable in three years, to the plaintiff. It appeared that Robert Wood, having granted an annuity to the plaintiff, which he desired to redeem, and which, together with charges upon it, was worth £4,134, brought to the plaintiff the bill in question which the plaintiff agreed to discount, and the £5,000 was made up of the price of the annuity, £4,134, £116 paid to the defendant in cash, and £750, three years' discount on the note. The present action was on a bond given as a substitute for the note, and the defence of usury was set up, which it was attempted to answer by considering the transaction as a discount in advance of the interest due on the £5,000 note, which would not be usurious. The court determined, that as the bill was for so long a time, coupled with its being a redemption of the annuity, it was evident that the transaction was not a discount in the way of trade, but a loan of money, a method of obtaining more than legal interest, which was corrupt in law, whatever the intention of the parties might have been. Lord *Alvanley*, C. J., said: "It is also contended, that at all events the negotiation of the bill of exchange was a transaction in the usual mode, in which all persons possessed of bills of exchange have been permitted to discount them; in which cases the interest is always deducted from the money advanced. It certainly has been determined, that such a transaction on a bill of

SECTION IX.

OF A CHARGE FOR COMPENSATION FOR SERVICE.

It is quite certain, that the lender, whether banker or broker, may charge, in addition to the discount, a reasonable

exchange, in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than five *per cent.* be taken upon the money actually advanced. In such cases the additional sum seems to have been considered in the nature of a compensation for the trouble to which the lender is exposed; and unless that indulgence were allowed, it might not be worth while for any merchant to discount a bill. If, therefore, nothing more has been done in this case than what always has been done by way of accommodation among merchants, the transaction was not usurious; but the rule must be confined strictly to that sort of transaction; for if discount be taken upon an advance of money without the negotiation of a bill of exchange, it will amount to usury, as appears clearly from the cases which were cited in the argument. We must, therefore, consider what was the real transaction between the parties." In Lloyd *qui tam v.* Williams, 2 W. Bl. 792, where Hinchliffe borrowed £100 of the defendant, and immediately paid him thereout £6 5*s.* advanced interest, and gave his note for £100 payable in three months, *De Grey*, C. J., and *Blackstone*, J., "inclined to think that the offence was consummated and completely committed on making the corrupt agreement, and receiving the interest by advance; and that it was not to be considered as merely a loan of £93 15*s.* The statute 12 *Anne* is express, that it is usury to take above five per cent. for the forbearing or giving day of payment, which plainly has respect to a taking of the interest, or forbearance, before the principal sum is due. And *Blackstone* conceived, that interest may as lawfully be received beforehand, for forbearing, as, after the term is expired, for having forborne. And it shall not be reckoned as merely a loan of the balance. For, if upon discounting a £100 note at five per cent., he should be construed to lend only £95, then, at the end of the time, he would receive £5 interest for the loan of £95 principal, which is above the legal rate." In Floyer *v.* Edwards, Cowp. 116, Lord *Mansfield* said, in reference to the general practice of trade to stipulate for a certain per cent. upon a neglect to pay the price of goods bought: "It is true the use of this practice will avail nothing, if meant as an evasion of the statute; for usage certainly will not protect usury. But it goes a great way to explain a transaction; and in this case is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calculation, it will be found, that the practice of the banks, in discounting bills, exceeds the rate of five per cent.; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury." In Maine Bank *v.* Butts, 9 Mass. 54, referred to above, in which it was decided that banks had no more right than individuals to receive more than six per cent. legal interest, and that the "banking privileges," given by the legislature, did not confer such a power, the court said: "That expression, if it has any peculiar meaning, is an authority to deduct the interest at the commencement of loans, or to make loans upon discounts, instead of the ordinary forms of security for an accruing interest. But individuals have a like authority, although in both cases the construction is a relaxation of the prohibitions of the statute against usury, and allows a rate of interest, which may be estimated at a small extent beyond six per cent. per annum. Banks, in their discounts, never venture to exceed that rate, in the deductions which they make from their loans, although this anticipation of interest, in

sum for his trouble or services. (*c*) And this principle is not confined to bankers and brokers, but is extended to all cases in which there may be such services as are fairly entitled to compensation, although the lender be neither banker nor broker, nor engaged in trade, and lends his own money. (*d*) But it

effect, gives more than the fixed rate upon the sum actually paid out." In Fleckner *v.* U. S. Bank, 8 Wheat. 354, the court say, upon this question: "The next point arising on the record is, whether the discount taken in this case was usurious. It is not pretended, that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent. per annum on the sum due by the note. The sole objection is, the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent. upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few if any charters contain an express provision, authorizing, in terms, the deduction of the interest in advance, upon making loans or discounts. It has always been supposed that an authority to discount, or to make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged, that the taking of interest in advance, by bankers, upon loans, in the ordinary course of business, is not usurious." See also, to the same effect as the foregoing cases: Manhattan Co. *v.* Osgood, 15 Johns. 162; Bank of Utica *v.* Phillips, 3 Wend. 408; Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; Bank of Utica *v.* Wager, 2 Cowen, 712; Stribling *v.* Bank of the Valley, 5 Rand. 132; Thornton *v.* Bank of Washington, 3 Pet. 36; State Bank *v.* Hunter, 1 Dev. 100; Cole *v.* Lockhart, 2 Cart. (Ind.), 631; McGill *v.* Ware, 4 Scam. 21; Ticonic Bank *v.* Johnson, 31 Me. 414; Sessions *v.* Richmond, 1 R. I. 305; Haas *v.* Flint, 8 Blackf. 67; Duncan *v.* Maryland Savings Institution, 10 Gill & J. 311. See also, Hoyt *v.* Bridgewater Co. 2 Halst. Ch. 253, 625.

(*c*) Auriol *v.* Thomas, 2 T. R. 52. Winch *v.* Fenn, cited 2 T. R. 52; Caliot *v.* Walker, 2 Anst. 496; *Rooke*, J., Hammett *v.* Yea, 1 B. & P. 156; Masterman *v.* Cowrie, 3 Camp. 488; *Ex parte* Jones, 17 Ves. 332; *Ex parte* Henson, 1 Maddock, 115; *Ex parte* Gwyn, 2 Dea. & Ch. 12; Gibson *v.* Livesey, cited 4 M. & S. 196; Fussell *v.* Daniel, 10 Exch. 581, 29 Eng. L. & Eq. 369; Kent *v.* Phelps, 2 Day, 483; Hutchinson *v.* Hosmer, 2 Conn. 341; Hall *v.* Daggett, 6 Cowen, 657; Nourse *v.* Prime, 7 Johns. Ch. 69; Trotter *v.* Curtis, 19 Johns. 160; Suydam *v.* Westfall, 4 Hill, 211; Suydam *v.* Bartle, 10 Paige, 94; Bullock *v.* Boyd, 1 Hoffm. Ch. 294; Holford *v.* Blatchford, 2 Sandf. Ch. 149; Seymour *v.* Marvin, 11 Barb. 80; M'Kesson *v.* M'Dowell, 4 Dev. & B. 120; Rowland *v.* Bull, 5 B. Mon. 146; Brown *v.* Harrison, 17 Ala. 774. See also, *Ex parte* Patrick, 1 Mont. & A. 385; Harris *v.* Boston, 2 Camp. 348.

(*d*) *Ex parte* Gwyn, 2 Dea. & Ch. 12. And in Palmer *v.* Baker, 1 M. & S. 56, where a right to purchase certain timber then standing on the land of the vendor, was assigned by the vendee, to secure a debt due from him, under which agreement the assignees were to take upon themselves the getting out and working of the timber, and after paying themselves the amount due them, with interest thereon, and after deducting "the further sum of £200, as and for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expenses, which they should or might expend, be put to, or be liable for, on account of the premises, or in anywise relating thereto," were to repay the same to their assignor; the court refused to nonsuit the plaintiff in the present suit, brought by the assignees, against the sheriff, who had seized a portion of the timber as the prop-

seems, that the sum paid as a compensation or commission for service or trouble in any case, must not exceed the amount usually taken in the course of trade in that business; and if it do, such excess will make the contract usurious. (*e*) If there be such charge, it will be a question for the jury, whether it is in fact a reasonable compensation for services rendered, or a mere pretence for obtaining usurious interest; (*f*) in which case

erty of the assignor, and decided that, as the jury had not found that the compensation was colorable, or excessive, the court could not say that the contract was usurious, since the compensation must therefore be taken to be a reasonable one, for the services performed and the trouble incurred. In Baynes *v.* Fry, 15 Ves. 120, a claim was made upon certain property, for commission money. The party claiming the commission, having advanced money at five per cent. interest, took bills upon Hamburg, which bills he sent there for the purpose of obtaining their amount, and upon this transaction the commission was claimed, which claim was objected to because it was usurious. Lord Chancellor *Eldon* said: "The first case upon this point was that upon the circuit, in 1780, Benson *v.* Parry, where Lord Chief Justice, then Baron *Eyre*, held, that a country banker, discounting bills payable in *London*, could not take a commission, but that was set right upon an application to the court. I take the facts of this case, as far as I can understand them, from the accounts that have been handed up, to stand thus: Hanson advanced money to these parties, upon the terms of receiving interest; desiring them, if they had bills upon *Hamburg*, to put them into his hands, for the purpose of sending them there, to procure acceptance and payment; in order to bring himself home, taking a reasonable commission for his trouble in doing so. That, according to modern doctrine, is not usurious."

(*e*) In Harris *v.* Boston, 2 Camp. 348, the plaintiffs were seed factors, and bought large quantities of rape seed for the defendant, advancing money thereupon, for which they charged the legal interest; and it was also agreed that they should have a commission of 2½ per cent. upon all the seed purchased. Upon an action to recover an amount due under this contract, to which usury was pleaded, many witnesses swore, that the highest commission they had ever known taken upon such purchases, was one shilling per quarter, which, at the current price of rape seed, amounted to exactly one per cent. Lord *Ellenborough* said: "If the plaintiffs would have duly made the purchase for one per cent., but charge 2½, besides legal interest, where they advance the money, this commission must be considered an expedient for enhancing the rate of interest beyond five per cent., and is a mere color for usury."

(*f*) Kent *v.* Phelps, 2 Day, 483; Hutchinson *v.* Hosmer, 2 Conn. 341; De Forest *v.* Strong, 8 Conn. 519; M'Kesson *v.* M'Dowell, 4 Dev. & B. 120; Bartlett *v.* Williams, 1 Pick. 294; Stevens *v.* Davis, 3 Met. 211; Brown *v.* Harrison, 17 Ala. 774. In Carstairs *v.* Stein, 4 M. & S. 192, the defendants allowed Kensington & Co. to draw upon them, for an amount not exceeding £20,000 at any one time, and were to receive a commission of one half per cent. upon the amount of the bills drawn. In this action, brought by the assignees of Kensington & Co., for balances alleged to be due, the defence of usury was alleged, and evidence was offered to show, that the commission of one half per cent. was unreasonable, and more than the accustomed rate. Lord *Ellenborough* directed the jury, that if the commission could be fairly set to the account of trouble and inconvenience, it was not usurious; otherwise, if the commission overstepped the *bona fide* trouble, and was mixed with an advance of money, in order to effect an inducement for such advance, from time to time, and his lordship inclined to consider the transaction, under the circumstances, usurious, but left it to the jury, who found otherwise for the plaintiff. Upon a motion for a new trial the court refused to disturb the verdict. Lord *Ellenborough*, C. J., said: "The principal question has been, whether the one half per cent. agreed to be charged for commission, in this case, is clearly referable to an usurious contract between the parties, for the payment of interest

of course, it will not be allowed. The party drawing a bill may also charge a sum, in addition to legal interest, as the rate of exchange between the place where the loan is actually advanced and the place where it is to be repaid; provided such charge is the customary rate, and therefore not a device to cover usury. (*g*) So, if the acceptor of a bill pays it before it is due, it is held that he may deduct a larger sum than legal interest on the amount, until the day of the maturity of the bill, without the transaction being usurious, (*h*) because, in fact, it is no loan, but a voluntary anticipation of a payment.

above five per cent. upon a loan of money, or whether it may not be referred to an agreed case of remuneration, justly demandable for trouble and expense incurred, in the accepting and negotiating bills remitted to and drawn upon them, and in the doing such other business as is stated to have been done by the Kensingtons, for the houses or rather for the house of the defendants, under its different names and descriptions. . . . . All commission, where a loan of money exists, must be ascribed to and considered as an excess, beyond legal interest, unless as far as it is ascribable to trouble and expense *bona fide* incurred, in the course of the business transacted by the person to whom such commission is paid; but whether any thing and how much is justly ascribable to this latter account, namely, that of trouble and expense, is always a question for the jury, who must, upon a view of all the facts, exercise a sound judgment thereupon." His lordship recapitulated here the suspicious circumstances in the case, and then said: "These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a color for usury, upon loans which were stipulated not to be required, but which were in fact required and made, from the beginning to the end of this business. But this question, that is, whether color or not, was a question for the consideration of the jury, and to their consideration it was fully left, with a strong intimation of opinion, on the part of the judge, that the transaction was colorable, and the commission of course usurious. The jury have drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw; and they, having done so, for the reasons already stated, we do not feel ourselves, as a court of law, and acting according to the rules by which courts of law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

(*g*) Andrews *v.* Pond, 13 Pet. 65; Buckingham *v.* McLean, 13 How. 151; Merritt *v.* Benson, 10 Wend. 116; Williams *v.* Hance, 7 Paige, 581; Ontario Bank *v.* Schermerhorn, 10 Paige, 109; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Holford *v.* Blatchford, 2 Sandf. Ch. 149; Cuyler *v.* Sanford, 13 Barb. 339; Commercial Bank *v.* Nolan, 7 How. (Miss.), 508. See also, Leavitt *v.* De Launy, 4 Comst. 364; Marvine *v.* Hymers, 2 Kern. 223.

(*h*) Barclay *v.* Walmsley, 4 East, 55. A bill for £30 was drawn on the defendant, dated July 14, 1801, and came by indorsement to Cutler. The bill was payable thirty days after date, and was presented by Cutler to the defendant, for acceptance, on the 20th August, when it was agreed that the defendant should pay the bill, then receiving an allowance of 6*d*. in the pound; and the defendant accordingly paid £29 5*s*. to Cutler, who thereupon gave him the bill. The plaintiff, having been nonsuited, at the trial, before Lord *Ellenborough*, the court refused to grant a rule to set the nonsuit aside. Lord *Ellenborough*, C. J., said, "that to constitute usury there must be either a direct loan and a taking of more than legal interest for the forbearance of repayment, or there must be some device contrived for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. But here was no loan or forbearance, only a mere anticipation of the payment of a debt, by the party, before the time when

SECTION X.

OF A CHARGE FOR COMPENSATION FOR RISK INCURRED.

As the lender may take a compensation for his trouble and services, so he may for the risk that he runs. By this, however, is not meant the personal risk of the debtor's ability to pay; for nothing of this kind is any justification whatever of more than legal interest. But where, by the nature of the terms of the contract, the repayment of money loaned is made to depend upon the happening of contingent events, there the lender may take, beside his interest for the sum loaned, enough more to insure him against the casualty which might destroy his claim; that is, so much more as this risk of loss is worth. Nor is there any definite standard for this, like that which the statutes give for legal interest; and any contract for loan of money upon extra interest, if the principal sum were actually at risk, would probably be sanctioned by the courts, unless it amounted, by its excess or its circumstances, to fraud and oppression. Upon this foundation rests a large class of mercantile contracts, of universal use and great importance, known by the names of loans on bottomry and respondentia. By these contracts, money is loaned, either on a pledge of the ship, or on that of the goods on board a ship, with condition, that if the ship or goods be lost, nothing of the principal or interest shall be repaid, but if they arrive safe, the principal shall be repaid with more than lawful interest. (*i*) And a bottomry bond may be made on time, as

by law he could be called upon for it. That the defendant had been guilty of very improper practice, but not of usury."

(*i*) Soome *v.* Gleen, Sid. 27, was debt, upon an obligation, the condition of which was, that if a certain ship should go to Surat, in the East Indies, and return safe to London, or if the owner or his goods should return safe, then the defendant should pay the plaintiff the principal money loaned, and £40 for every £100; but if the ship, &c., should perish by unavoidable casualty of sea, fire, or enemies, the plaintiff should have nothing. The question whether the contract was usurious, was argued, by *Earle* for defendant, who agreed that if the condition had been solely that if the ship should return safe, this would have been a good bottomry contract, and an apparent hazard of the principal, but contended, that since here the contingency was so remote, that

well as on a specific voyage. (*j*) This is often — or certainly may be — used as a means of lending money on usurious interest. If, for example, the loan is for one year, at twelve per cent., six per cent. being legal, and the lender insures the ship (which he may lawfully do) (*k*) for three per cent., he gets nine per cent. for the use of his money. Still, these contracts are sanctioned by the law and usage of every mercantile country, and are protected by courts, provided the principal and interest are both put at hazard, by the very contract itself. For this is the one condition of their validity. (*l*)

if the owner of the ship or his goods returned it would not happen, the contract was within the statute, for otherwise the statute of usury would be of no effect. But it was replied by the counsel for the plaintiffs, and resolved by the court, that this was not usury, within the statute, but a good bottomry contract. And Chief Justice *Bridgman* took a diversity between a bargain and a loan, for where there is a plain and square bargain (as here), and the principal hazarded, this cannot be within the statute of usury. But otherwise is it of a loan which is intended where the principal is not hazarded. And there are apparent dangers of the sea, fire, and enemies, between this and the East Indies, which endanger the loss of the principal. And they said that such contracts, called bottomry, tend to the increase of trade, and that on which many orphans and widows live in the port towns of this realm. Judgment by the whole court was for the plaintiff, that this contract is not usurious. Sharpley *v.* Hurrel, Cro. Jac. 208, was debt upon an obligation. "The defendant pleaded the statute of usury; and showeth that a ship went to fish in Newfoundland, which voyage might be performed in eight months, and that the plaintiffs delivered fifty pounds to the defendant, to pay sixty pounds upon return of the ship, off *Dartmouth;* and if the said ship, by occasion of leakage, or tempest, should not return from Newfoundland to Dartmouth, then the defendant should pay the principal money, namely, fifty pounds only; and if the ship never returned, he should pay nothing. And it was held, by all the court, not to be usury, within the statute; for if the ship had staid at Newfoundland two or three years, he should have paid at the return of the ship but sixty pounds; and if the ship never returned, then nothing; so that the plaintiff ran a hazard of having less than the interest, which the law allows, and possibly neither principal nor interest." See also, to this effect, Earl of Chesterfield *v.* Janssen, 1 Wilson, 286, 1 Atk. 342, 348, 2 Ves. Sr. 143, 148, per *Burnett*, J., and Sir *John Strange*, M. R.; Rucher *v.* Conyngham, 2 Pet. Adm. 295; The Sloop Mary, 1 Paine, C. C. 675; *Doderidge*, J., in Roberts *v.* Trenayne, Cro. Jac. 508; Garret *v.* Foot, Comb. 133.

(*j*) Thorndike *v.* Stone, 11 Pick. 183, *infra*.

(*k*) Id.

(*l*) In Thorndike *v.* Stone, 11 Pick. 183, the plaintiff brought an action upon a penal bond, the condition of which recited a loan of $18,000, by the plaintiff, to the defendant, which sum was to run at bottomry, upon the ship Israel, at and from Boston, to and in any ports and places, during the term of three years from the date of the bond, at the interest and premium of 12 per cent. per annum; and declared that the defendant should also pay to the plaintiff, during the three years, one half of the gross earnings of the ship, which should go in discharge of the principal sum and the premium due upon it; that the defendant might make any further payments within the three years; that upon all such payments the plaintiff should thereafter bear the risk only of the amount actually due on the bond, being entitled to retain all payments made to him, whether the ship were lost or not, and the ship being pledged to the plaintiff to secure the balance due at any time; and the bond was to be void upon the defendant's performance of the agreement, and the payment of any sum which might be due under it, at the expiration of

This same principle is applied to some land contracts; as if one buys an annuity, or rent charge, even on exorbitant terms, it is still no usury. From the authorities on this subject it may be inferred, that the grant of an annuity, at any price, for an uncertain period, either upon a purchase or a loan, is not usurious, because the lender or purchaser incurs the risk that he may never be entitled to receive the amount loaned or paid. If the transaction be, in fact and in good faith, a purchase, any actual contingency, although slight, will prevent the contract from being usurious; and even if the annuity granted by the seller be so large that a court of equity will set it aside as unconscionable, yet it is not thereby usurious. But if it appears that a loan was in fact intended between the parties, and the form of an annuity was resorted to merely as the shape or method of the loan, the contingency must now be real and substantial, and of sufficient magnitude; for if it appears to be so slight as to be merely colorable, or such that the probability of its occurrence could not have been for any material purpose within the contemplation of the parties, this shape of an annuity will not protect the transaction from the penalties of usury. (*m*)

the three years. It appeared also, that the defendant mortgaged certain real estate to the plaintiff, to secure the performance of the condition of the bond; that the plaintiff procured $10,000 insurance on the vessel for one year, at five and a half per cent., and that the defendant also insured the vessel for a certain voyage. It was contended, for the defendant, that this was not a bottomry bond, but a contract at common law, and usurious. *Putnam*, J., delivered the opinion of the court: "We are all clearly of opinion, that the objections which the defendant's counsel have made to the plaintiff's recovery, cannot prevail. It is said that this is not a bottomry bond, but a usurious contract; and the court are to determine whether it be one or the other, upon the facts which are agreed by the parties. It is argued, that payment of the money borrowed, is secured in such a manner as to make it a certainty that the plaintiff would receive his money with twelve per cent.; that it is secured by a mortgage of real estate, as well as by a mortgage of the ship, and an assignment of half the freight and earnings for the term of the loan; and it is further objected, that the loan is upon time, and not for a voyage, as it is usually made. But the answer to these objections is, that if the ship should be lost within the time of three years, for which the money was lent, the plaintiff was to lose all the money which should be then due upon the bond. It is the essence of the contract of bottomry and respondentia, that the lender runs the marine risk, to be entitled to the marine interest. The rate of interest, and the manner of securing the payment of what may become due upon such contracts, are to be regulated by the parties. Those considerations are not to be regarded by the court, excepting only to ascertain whether they were colorably put forth to evade the statute against usury. We do not perceive any thing in the facts which would warrant that conclusion. If the ship had been lost immediately after she sailed, it is perfectly clear that the plaintiff would have lost all his money."

(*m*) Roberts *v.* Tremoille, 2 Rolle, 47; Fountain *v.* Grymes, Cro. Jac. 252, 1 Bulst. 36; Flower *v.* Sherard, Ambler, 18; Lloyd *v.* Scott, 4 Pet. 205; Scott *v.*

It has been held that loans, of which the repayment is made to depend on the life of the parties, come within the same principle. (*n*) So also with regard to loans to be repaid on the

Lloyd, 9 Pet. 418. In Richards *v.* Brown, Cowp. 770, Lord *Mansfield* treats an annuity upon the borrower's life, with a right, on his part, to redeem at the end of three months, as involving only the contingency of the borrower's dying within that three months; and after showing that the transaction between the parties was essentially a loan says: "It is true, there was a contingency during the three months. It was *that* which occasioned the doubt, whether a contingency for three months is sufficient to take it out of the statute. As to that the cases have been looked into, and from them it appears, that if the contingency is so slight, as to be merely an evasion, it is deemed colorable only, and consequently not sufficient to take it out of the statute. Here the borrower was a hale young man, and therefore we are of opinion that there was no substantial risk, so as to take this case out of the statute." But it seems that where the right to redeem is optional with the seller, the purchase is not usurious, because the purchaser or lender cannot compel a repayment of his principal, and it is therefore a risk. King *v.* Drury, 2 Lev. 7; Murray *v.* Harding, 2 W. Bl. 859. See also, *Bayley*, J., White *v.* Wright, 3 B. & C. 273; Chippindale *v.* Thurston, 1 Moody & M. 411; Earl of Mansfield *v.* Ogle, 24 Law J. N. S. Ch. 450, 31 Eng. L. & Eq. 357. Since the introduction of life insurance, the purchase of an annuity may be made the means of effecting a loan at more than legal interest, and that certainly secured, as the purchaser may guard against the contingency of the grantor's death by effecting insurance on his life. *Hardwicke*, L. C., Lawley *v.* Hooper, 3 Atk. 278; *Blackstone*, J., Murray *v.* Harding, 2 W. Bl. 865. And where an annuity was granted for four lives, with a covenant that the grantor, within thirty days after the expiration of the third life, should insure the principal sum upon the life of the survivor, the covenant was held not to make the transaction usurious. *In re* Naish, 7 Bing. 150. See also, Morris *v.* Jones, 2 B. & C. 232; Holland *v.* Pelham, 1 Cromp. & J. 575, 1 Tyrw. 438. It was anciently decided, that annuities for terms of years, by which it was evident that eventually more than the principal sum and legal interest would be paid, were not usurious, being merely purchases. Fuller's case, 4 Leon. 208; Symonds *v.* Cockerill, Noy, 151; Cotterel *v.* Harrington, Brownl. & G. 180; King *v.* Drury, 2 Lev. 7; *Twisden*, J., in Rowe *v.* Bellaseys, 1 Sid. 182. But in Doe *v.* Gooch, 3 B. & Ald. 666, upon Sir James *Scarlett's* saying, that if a person have an annuity secured on a freehold estate, with a power of redemption, such power will not make the bargain usurious, *Bayley*, J., remarked: "In that case the principal is in hazard, from the uncertain duration of life. Here it is in the nature of an annuity for years, and there is no case in which such an annuity has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received." And, where an annuity was granted for 11½ years, payable half yearly, the seller giving twenty-three promissory notes for the half-yearly payments; and it appeared in evidence, that these payments would pay the purchase-money of the annuity, and interest, at nearly 12*l.* per cent. per annum; the Master of the Rolls said: "With respect to this question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to repay the principal sum of 4,000*l.*, with interest, by twenty-three instalments, and as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious."

(*n*) In Burton's case, 5 Rep. 69, *Popham*, C. J., said: "If A comes to B to borrow £100, B lends it to him if he will give him for the loan of it for a year £20, if the son of A be then alive. This is usury within the statute; for if it should be out of the statute, for the uncertainty of the life of D, the statute would be of little effect; and by the same reason that he may add one life, he may add many, and so like a mathematical line, which is *divisibilis in semper divisibilia*." In accordance with this principle, Clayton's case, 5 Rep. 70, in which Reighnolds lent Clayton £30 for six months, to be paid at that time £33 if Reighnold's son should be then alive, if not, to be paid £27, was decided to be usurious. Button *v.* Downham, Cro. Eliz. 643, was similarly decided;

death of a party, or post-obit contracts, which, even if excessive and oppressive, and on that ground avoided in equity are, nevertheless, not usurious. (*o*)

but in Bedingfield *v.* Ashley, Cro. Eliz. 741, in which Ashley, for £100, covenanted with Gower to pay to every one of Gower's five daughters, who should be alive in ten years, £80, this transaction was resolved by all the judges not to be usury; "for it is a mere casual bargain, and a great hazard, but that in ten years, all the daughters, or some of them will be dead; and if any of them be not alive, he shall thereby save £80. But if it were that he should pay £400 at the end of ten years, if any of them were alive, it were a greater doubt. Or if it had been that he should pay at the end of one or two years, £300, if any of the said children were alive, that had been usury; for in probability one of them would continue alive for so short a time, but in ten years are many alterations." And in Long & Wharton's case, 3 Keble, 304, which was "Error of judgment, in debt, on obligation to pay £100, on marriage of the daughter, and if either plaintiff or defendant die before, nothing. The defendant pleads the statute of usury, and that this was for the loan of £30 before delivered, to which the plaintiff demurred, and *per curiam*, this is plain bottomry, and judgment affirmed."

(*o*) The great case on the validity of *post-obit* bonds, is that of Chesterfield *v.* Jansson, 1 Atk. 301, 2 Ves. Sr. 125, 1 Wilson, 286. The defendant paid Mr. Spencer, testator of the plaintiffs, £5,000, and took from him a bond for £20,000 conditioned for the payment of £10,000 to the defendant, at or within some short time after the death of the Duchess of Marlborough, in case Mr. Spencer survived her, but not otherwise. In six years the Duchess died, and shortly after her death Mr. Spencer renewed the bond of £20,000, to the defendant, with a condition for the payment of the £10,000 on the next April, — gave the defendant a warrant of attorney to confess judgment against him, and about a year after this paid £2,000 on the new bond. Two years after the Duchess of Marlborough's death, Mr. Spencer died, and his executors brought this bill to be relieved against the bond to the defendant, as unreasonable and usurious, being independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty, so that by reason of the great age and infirmity of the Duchess, and her consequent approaching death, the requiring £10,000 for the forbearance of £5,000, was more than legal interest. The cases upon the subject of loans, upon contingencies, *post-obits*, &c., down to the time of this case, were collected and cited by the able counsel employed; and Lord Chancellor *Hardwicke*, Sir *John Strange*, M. R., and Mr. Justice *Burnett*, decided, that the loan to Mr. Spencer being upon a contingency, whereby the principal was *bona fide* hazarded, was not usurious; and although they would have relieved against the bargain as unconscionable, had it not been confirmed, they held that the execution of the new bond, by Mr. Spencer, and a part payment upon it, confirmed and ratified the agreement, so that they could not relieve. It will be noticed, that in this case there was a possibility, in case Mr. Spencer should die before the Duchess, that no part of the money lent would be repaid; and therefore this case does not go the extent of deciding that where there is a contract to pay money, at all events, upon the death of a party, such contract is good by reason of the uncertainty of the amount that will eventually be received. But in Batty *v.* Lloyd, 1 Vern. 141, the defendant had agreed with the plaintiff, who had an estate fall to her, after the death of two old women, to give her £359, in consideration of receiving £700 at the death of the two women, which money the plaintiff was to secure by a mortgage of her reversionary estate. Both the women died within two years afterwards; and the plaintiff being sorry for her bargain, brought this bill to be relieved. Lord Keeper *North* said: "I do not see any thing ill in this bargain. I think the price was of full value, though it happened to prove well. Suppose these women had lived twenty years afterwards, could Lloyd have been relieved by any bill here? I do not believe you can show me any such precedent. What is mentioned of the plaintiff's necessities, is, as in all other cases — one that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of

SECTION XI.

CONTRACTS IN WHICH A LENDER BECOMES PARTNER.

It is often attempted to apply the same principle to the law of partnership, and to protect contracts in which money has been loaned from the imputation of usury, by the defence, that the person advancing the money becomes a partner with the person receiving it, and liable as such for the debts of the partnership, and that, therefore, there is a substantial risk, which protects the transaction from being usurious, although, by the terms of the agreement, the party is to receive more than legal interest for his money.

In reference to this question, it seems in general clear, that where a contract of partnership is expressly entered into by the parties, or where money is advanced, and the party advancing it reserves, instead of interest, a certain proportion of the profits of a certain business, so that, in the construction of law, a partnership may fairly be presumed to be intended, and the contract is in neither case intended as a device to cover a usurious loan, then the contract lacks that essential element of the crime of usury, — a loan of money, — and therefore no usury is committed; although the partner advancing the money may and

ground that lay near mine, for my convenience, he would ask me almost twice the value; so where people are constrained to sell, they must look not to have the fullest price; as in some cases that I have known, when a young lady that has had £10,000 portion, payable after the death of an old man, or the like, and she, in the mean time, becomes marriageable, this portion has been sold for £6,000, present money, and thought a good bargain too. It is the common case; pay me double interest during my life, and you shall have the principal after my decease." In Lamego *v.* Gould, 2 Burr. 715, defendant gave plaintiff this writing, receiving therefor two guineas; "Memorandum. In consideration of two guineas, received of Aaron Lamego, Esq., &c., I promise to pay him twenty guineas, upon the decease of my present wife, Anne Gould." The question was, whether it was usurious, the woman being at the time seventy years of age. The court held it no usurious loan, but only a wager. Matthews *v.* Lewis, 1 Anstr. 7, was a case in which Lewis, upon a loan of £1,600, gave *post-obits* for £3,200, payable on the death of either Lewis's mother or grandmother, from whom he was entitled to large property, and his grandmother being eighty-seven years of age. The court said: "This is nothing like usury. It is a catching bargain, an extortioning *post-obit*, but no usury."

probably will receive more than would amount to legal interest upon it. (*p*)

And if it be clear that a partnership was *bona fide* intended, and that there was no contrivance to cover a loan, there is no usury, although one of the partners covenants that he will bear all the losses, and pay the other, as his share of the profits, a certain sum, which amounts to more than legal interest on that other share in the capital; for here is still no loan of money. (*q*)

But where the contract is for a loan of money, in the form or under the disguise of a partnership, and for its use the borrower contracts to pay legal interest, and also a certain proportion of the profits of a trade or business, this is usurious, although the lender may be made liable, as a partner, for the debts incurred by the borrower in the course of the trade or business; because, if he is so compelled to pay, he still has his remedy over against the borrower, and therefore runs no ultimate risk, except that of the borrower's insolvency, which, as we have seen, is not enough. (*r*)

SECTION XII.

OF SALES OF NOTES AND OTHER CHOSES IN ACTION.

It is quite settled that negotiable paper may be sold for less than its face, and the purchaser can recover its whole amount from the maker when it falls due, although he thereby gets much more than legal interest for the use of his money; and this principle is extended to bonds and other securities for money loaned.

The reason on which this rule rests is obvious. For such paper is property; and there is no more reason why one may not sell notes which he holds, at a price made low either by doubts of the solvency of the maker, or by a stringency in the

(*p*) Fereday *v.* Hordern, 1 Jacob, 144; Morrisset *v.* King, 2 Burr. 891.

(*q*) Enderby *v.* Gilpin, 5 J. B. Moore, 572, 1 Dowl. & R. 570, 5 B. & Ald. 954; Fereday *v.* Hordern, 1 Jacob, 144.

(*r*) Morse *v.* Wilson, 4 T. R. 353; Huston *v.* Moorhead, 7 Barr, 45

money market, than why he should not be able to sell his house or his horse at a less than the average price. But the purchase must be actual, and made in good faith, and not merely colorable, and intended to give efficacy to a usurious contract. For if the mere form of a sale was sufficient, it is obvious that the usury laws would lose all their force; for the lender need only refuse to lend at all, and propose instead, to buy the note of the borrower. It is, therefore, important to discriminate between these two cases; that is, between a loan, in the form of a sale, and an actual sale and purchase. And this discrimination is very difficult; nor is it quite certain from authority what rules govern this question. We may say, that if the payer lends, and the borrower gives his note for legal interest, the lender, having thus acquired the note, may afterwards sell it for the most he can get, and it is obvious that the lender takes nothing usurious; and if he loses by the second transaction, and the purchaser gains, it is a loss and gain on a purchase, and not on a loan. And, both on authority and on general principles, it would seem, that the first owner of the note must pay for its full amount, or else, though he may say he purchases it of the maker, in fact he only lends on his security, and that usuriously. (*s*) Again, if this be true where the parties deal directly together, it should be equally true where they deal through an agent. And then it would follow, that if the maker, whom we may suppose to be one of our railroad corporations, issues its notes or bonds, and gives them to a broker, to raise money on them, for the use

(*s*) The following American authorities determine, that where a note has been fairly executed, and there is no usury between the original parties, so that the payee has acquired a legal right to sue the maker upon the note, he may then dispose of it, at any rate of discount from its face, and the purchaser will have a right to enforce it for its full amount against the maker. Nichols *v.* Fearson, 7 Pet. 107; Moncure *v.* Dermott, 13 Pet. 345; *Jones*, Ch., Powell *v.* Waters, 8 Cowen, 685; Rice *v.* Mather, 3 Wend. 65; Cram *v.* Hendricks, 7 Wend. 569; Munn *v.* Commission Co. 15 Johns. 55; Rapelye *v.* Anderson, 4 Hill, 472; Holmes *v.* Williams, 10 Paige, 326; Holford *v.* Blatchford, 2 Sandf. Ch. 149; Ingalls *v.* Lee, 9 Barb. 647. *Parsons*, C. J., Churchill *v.* Suter, 4 Mass. 162; Lloyd *v.* Keach, 2 Conn. 179; Tuttle *v.* Clark, 4 Conn. 153; King *v.* Johnson, 3 McCord, 365; Musgrove *v.* Gibbs, 1 Dall. 217; Wycoff *v.* Longhead, 2 Dall. 92; French *v.* Grindle, 15 Me. 163; Farmer *v.* Sewall, 16 Me. 456; Lane *v.* Steward, 20 Me. 98; Hansborough *v.* Baylor, 2 Munf. 36; Shackleford *v.* Morriss, 1 J. J. Marsh. 497; Oldham *v.* Turner, 3 B. Mon. 67; Metcalf *v.* Pilcher, 6 B. Mon. 529; May *v.* Campbell, 7 Humph. 450; Saltmarsh *v.* Planters & Merchants Bank 17 Ala. 768.

of the corporation, and the broker sells them to his customers for less than the face, or par value, such a transaction would be a loan, and a usurious loan, from those customers to the corporation. And if the paper was indorsed or assigned to any person, without consideration, and without giving any ownership of the paper to him, and only for the purpose of facilitating the raising of money, or concealing the real character of the transaction, it would still fall within the same principles, and be only a loan. It is in this way we should speak of this question, on principle; but in practice it becomes complicated and embarrassed by the further question, how far the knowledge, understanding, or intention of the party who gives the money on the paper, goes to determine whether it be a purchase or a loan. For example, if, in the last case supposed, he who advances the money becomes the first owner of the note, does this of itself make it a usurious loan to the maker, or may the advancer of the money insist upon the fact that, in point of form, he purchased the paper, and that he did not in reality know, and could not have inferred, from any of the circumstances of the case, that the party from whom he bought was not either the owner or the agent of the owner of the note, for valuable consideration? Many reasons would lead us to favor this defence; and to hold that, although, if a note be given upon the reception of much less than its amount, and be therefore usurious as between the first parties, it carries this taint with it into the hands of subsequent *bonâ fide* holders, yet because, in order to constitute a usurious contract of this kind, a similar intent must coöperate in both parties to the loan, the fact that the maker of the note or bond, and the agent to whom he delivered it to dispose of, might intend, in contemplation of law, to commit usury, would not supply the want of such intent on the part of the party intending to make a purchase, and who had no knowledge or intention of a loan. On the whole, therefore, we are inclined to give, as the prevailing rule, that where one supposes himself to be purchasing negotiable paper of an owner, and is without notice to the contrary, either actual or derivable from the circumstances of the case, this advancer of the money would have all the privilege and safety of a pur-

chaser. (*t*) There are no authorities within our knowledge, which, upon a fair construction, go beyond this; although it may be true that some of those which we have above cited might almost justify the conclusion, that if the paper be purchased in form, the maker cannot object on the ground that it was a usurious loan. But it is not easy to recognize any principles which would go further than to extend the attributes of a purchase to any party who believed in good faith that he was a purchaser.

In speaking thus far of the sale of notes, we have had particular reference to those which were transferred by delivery, or by indorsement without recourse. Another question has been raised, however, when the transfer was made by an indorsement which left the indorser liable if prior parties did not pay; and this question is, whether the transaction did not then become usurious, if the note was sold for less than its face, because the indorser would then be bound to pay a larger sum than that which he had received, with lawful interest upon it. The cases upon this subject are somewhat conflicting, but the difficulty has, we think, arisen from disregarding the peculiar character of negotiable paper, and also from forgetting that the whole law of usury is, in its nature, penal, and therefore to be strictly construed. If one transfer a note by indorsement, he does two things; he transfers the note, and he also becomes liable for its payment; but the latter is incidental to the former. The substance of the transaction is a transfer of the property in the note, a sale, and nothing more than a sale; and therefore we say that the price paid has nothing to do with the question, as one of usury. But besides this, it is important to observe, that such a transaction can be made usury only by a very large construction of that word; no money is loaned or borrowed, or forborne, in any way whatever; it cannot therefore be usury, within any accuracy of interpretation. We do not mean to say, of course, that actual and intended usury could be successfully covered by a mere disguise of this kind. In case of such an

(*t*) This view is supported by Law *v.* Sutherland, 5 Gratt. 357; Whitworth *v.* Adams, 5 Rand. 333; Shackleford *v.* Morriss, 1 J. J. Marsh. 497; Hansbrough *v.* Baylor, 2 Munf. 36; Holmes *v.* Williams, 10 Paige, 326.

attempt it would be declared a usurious loan, because it would be such, and would have the effect of usury; but if it were a *bonâ fide* sale of the note, the indorsement, and the liability derived from it, would not, in our judgment, impart to the transaction a usurious character.

A further question may then be raised; if the holder sues the indorser, can he recover the face of the note, or only what he paid, with legal interest? We are of opinion that he may recover the amount upon the face of the note, from his indorser, as well as from any prior party. It is this amount he buys; it is this which he had a right to buy, and which the indorser had a right to sell, and a right to guarantee.

By some authorities it has been held, that the indorsement of the note, by the nominal seller, or the giving of security in any way for its payment, in case of the failure of the party primarily liable, makes the transaction usurious, as matter of law. These cases seem to proceed upon the principle, that there is no substantial reason why the holder of the paper should dispose of it for less than its face, when he may be called upon to repay its full amount; and therefore the transaction must be regarded as intended by the parties to be an actual loan, upon usurious interest. (*u*) According to the weight of authority, however, where there is sufficient evidence that the transaction was a sale, and not a covert loan, the fact that the seller indorsed the paper, is not considered as changing the character of the contract, and making it usurious. Nevertheless, these cases seem to admit, that if the purchaser could recover from the seller and indorser the full amount of the face of the paper sold, the contract would be a loan, and usurious; and they therefore decide that the purchaser is limited in his action against the seller and indorser, to a recovery of the amount actually paid by him, with lawful interest thereon. (*v*) We think, however, that these

(*u*) Ballinger *v.* Edwards, 4 Ired. Eq. 449; McElwee *v.* Collins, 4 Dev. & B. 209; *Walworth*, Ch., Cram *v.* Hendricks, 7 Wend. 573. *Cowen*, J., Rapelye *v.* Anderson, 4 Hill, 472.

(*v*) Cram *v.* Hendricks, 7 Wend. 569; Rapelye *v.* Anderson, 4 Hill, 472; Ingalls *v.* Lee, 9 Barb. 647; French *v.* Grindle, 15 Me. 163; Farmer *v.* Sewall, 16 id. 456; Lane *v.* Seward, 20 id. 98; Brock *v.* Thompson, 1 Bailey, 322. See also, Freeman *v.* Brittin, 2 Harrison, 191; Metcalf *v.* Pilcher, 6 B. Mon. 530; May *v.* Campbell, 7 Humph. 450.

cases proceed upon a wrong principle, and the courts seem to be misled by a difficulty in the application of their principles to practice. If a payee of a note actually sell it to a purchaser, with his indorsement, the whole transaction, upon analysis, will be found to be this: It is not a loan of money, but the purchaser of the note buys a right to sue the maker of the note, and also an engagement for value on the part of the seller, that the maker shall pay the face of the note. There is no more loan in the case, than in the sale of goods, with a warranty that they shall be fit for the purposes for which they are bought. It may be true that he can get much more for the note if he indorses, than if he does not; and it may be true that he will get more for the goods if he warrants them, than if he does not; but in neither case does this circumstance convert the sale into a loan. It often happens that the seller is known to be in insolvent or very precarious circumstances, without any probability of being able to refund, in case of the maker's default; here the value of the paper consists of the indorser's liability to pay; but it would be difficult to show that even this transaction was essentially a loan to the indorser. Undoubtedly, a usurious transaction might seek the disguise of this form of contract, as well as of any other. And neither this nor any disguise should protect it. But we speak of actual sales of notes and bills, by indorsement, in good faith. And of these, the preceding considerations have led us to the conclusion we have above stated. We go, perhaps, beyond the authorities, but not beyond the practice; and we cannot but think that the rule of law should be, that in case of an actual sale of a note, at a discount, with an indorsement by the seller, the indorser should be held liable for the full amount, on the maker's default.

These considerations lead us to those cases where one indorses or gives accommodation paper, for a premium paid him, which may be an outright sum, or a percentage. Such a transaction has been thought, by many courts and judges, to be usurious, if the sum paid exceed six per cent. on the notes indorsed or given; but we think it is not so, on the plain ground that a man may sell his credit, as well as any thing else that he has, and may sell it for the most that he can get.

The earlier cases on this subject held, that upon a sale of one's credit in this manner, the party indorsing or guaranteeing might receive a compensation for so doing, provided it did not exceed lawful interest upon the amount of the debt guaranteed, or the credit sold. (*w*) But if a transaction of this kind can be regarded as such a sale of credit as that a price may be taken therefor by the seller as his payment, we do not see, upon principle, any limit to the amount which may be taken, other than that which belongs to all sales. When a party indorses a note, or guarantees a debt, as surety for another, he actually advances no money, and is therefore at no pecuniary loss, until compelled, by reason of his suretyship, to pay the debt for which he was bound. If he pays this, the law creates at once, an obligation upon the party whose debt he pays, to reimburse to him the sum he pays with legal interest. And if the sum originally received by a party thus selling his credit, is to be considered as interest, added to the amount for which the law gives him this obligation, there is a larger amount secured for interest, than the legal interest, whatever be the amount paid for the credit; for all that is paid is excess. On this ground, therefore, the bargain is usurious, whether more or less is paid. But if the transaction is to be considered as a sale of the credit of the party indorsing; which credit is his property, to dispose of as he pleases, and property which the purchaser may profitably and lawfully buy, the price paid and received must be considered as entirely independent of the resulting right of the indorser or guarantor to get indemnity, if he can, for whatever he is obliged to pay. It is then no loan, but a sale, which, in respect to the price that may be paid, is like any other sale; and this view, we think, is sustained by the later and better authorities. (*x*)

In the case of cross notes, where A gives his note to B, and B gives his note to A, but A's credit is much better than B's, and it is a part of the bargain that the notes from B to A shall be greater than the notes from A to B, or that A shall have any

(*w*) Dey *v.* Dunham, 2 Johns. Ch. 182; Fanning *v.* Dunham, 5 id. 122; Bullock *v.* Boyd, 1 Hoff. Ch. 294; Moore *v.* Vance, 3 Dana, 361.

(*x*) See Ketchum *v.* Barber, 4 Hill, 224; More *v.* Howland, 4 Denio, 264; Dry Dock Bank *v.* American Life Ins. & Trust Co. 3 Comst. 344. See also, Cobb *v.* Titus, 10 N. Y. (6 Seld.), 198.

sum by way of a premium on the transaction; this has been considered usurious; but not, as we think, on sufficient grounds. Here, as before, we deem it a lawful sale of one's credit, and neither borrowing nor lending, nor forbearing money, in any way. (y) We repeat, however, the remark, to avoid misconception, that we speak only of *bonâ fide* transactions of this kind, and not of those which are used as mere pretences for actual usury. This, however, would generally be a question of fact for the jury, and not a question of law.

SECTION XIII.

OF COMPOUND INTEREST.

Contracts for compound interest are sometimes said to be usurious, but this may not be considered quite certain. We are aware of no case, in England or in this country, in which a contract to pay compound interest has been held usurious, so as to become totally invalid, or in which the actual reception of compound interest has been held to be a commission of the crime of usury, and punishable as such. Indeed, it is difficult to see how this could be the case. If A lend to B one hundred dollars, for two years, at six per cent. legal interest, payable annually, and it is agreed, that if A does not pay the interest at the end of the first year, it shall be considered as principal, and added to the amount of the loan from that time (which is a contract for compound interest), and the interest not being paid annually, A becomes entitled, at the end of two years, to receive, and does receive, under the agreement, one hundred and twelve dollars and thirty-six cents, instead of one hundred and twelve dollars, the principal and simple interest, he does not receive more than after the rate of six dollars per year for the forbearance of one hundred, but has received exactly that sum, and six per cent. legal interest upon another sum which B was

(y) See Dunham *v.* Gould, 16 Johns. 367; Dry Dock Bank *v.* American Life Ins. & Trust Co. 3 Comst. 344.

under a legal obligation to pay him, for which B might have been sued, and for the forbearance of which he has agreed to pay its legal value. Accordingly, courts do not generally declare such contracts usurious, and the extent to which they have gone, is that of refusing to enforce a contract to pay interest thereafter to grow due; and they have done this, not upon the ground of usury, but rather as a "rule of public policy," because such agreements "*savor* of usury," and "lead to oppression. (*z*)

On the other hand, if an agreement is made to convert interest already due into principal, or if accounts between parties are settled by rests, and therefore in effect upon the principle of compound interest, which may be done by an express accounting, (*a*) or under a custom of forwarding accounts quarterly, half yearly, or yearly, to the debtor, who acquiesces in them by his silence; (*b*) these transactions are valid, and sanctioned by the law; and such a method of computation is sometimes even directed by courts. (*c*) If compound interest has accrued, even under a prior bargain for it, and been actually paid, it cannot be recovered back, (*d*) nor are the penalties affixed to the crime of usury annexed to such taking; and if a note be given for such payment, the note has a sufficient legal consideration to sustain an action upon it. (*e*)

We are not sure that contracts to pay interest upon interest may not derive illustration from a comparison with those, upon which the law, as we have seen, is quite well settled, where one engages to pay money at a certain time, and then binds him-

(*z*) Ossulston *v.* Yarmouth, 2 Salk. 449; Waring *v.* Cunliffe, 1 Ves. Jr. 99; Chambers *v.* Goldwin, 9 Ves. 271; Dawes *v.* Pinner, 2 Camp. 486; Doe *v.* Warren, 7 Greenl. 48; Hastings *v.* Wiswall, 8 Mass. 455; Camp *v.* Bates, 11 Conn. 487; Mowry *v.* Bishop, 5 Paige, 98; Childers *v.* Deane, 4 Rand. 406; Connecticut *v.* Jackson, 1 Johns. Ch. 13; Wilcox *v.* Howland, 23 Pick. 169; Stohely *v.* Thompson, 34 Penn. St. 210.

(*a*) Ossulston *v.* Yarmouth, 2 Salk. 449; Tarleton *v.* Backhouse, G. Cooper, Ch. 231; Mowry *v.* Bishop, 5 Paige, 98; Fobes *v.* Cantfield, 3 Ham. 18; Childers *v.* Deane, 4 Rand. 406.

(*b*) Caliot *v.* Walker, 2 Anst. 496; Eaton *v.* Bell, 5 B. & Ald. 34; Morgan *v.* Mather, 2 Ves. 15; Bruce *v.* Hunter, 3 Camp. 466; Moore *v.* Voughton, 1 Stark. 487; Bainbridge *v.* Wilcox, 1 Bald. 536. See also, Pinhorn *v.* Tuckington, 3 Camp. 467.

(*c*) See *ante*, vol. 1, p. 122, n. (*f*).

(*d*) Dow *v.* Drew, 3 N. H. 40; Mowry *v.* Bishop, 5 Paige, 98.

(*e*) Otis *v.* Lindsey, 1 Fairf. 316; Wilcox *v.* Howland, 23 Pick. 169; Kellogg *v.* Hickok, 1 Wend. 521; Hill *v.* Meeker, 23 Conn. 592. But compound interest paid in error, may be recovered back. Major *v.* Tardos, 14 La. An. 10.

self to pay a further sum, exceeding interest, if the principal sum be not duly paid; this is certainly not usurious. One of the reasons for this rule is, that the penalty will be reduced, in equity, to the amount of the debt; but another, and as we think, the principal reason is, that the debtor may pay his debt when it is due, and thus avoid the contract which obliges him to pay a penalty; so that there is, in such case, no absolute contract for the payment of more than legal interest. Now, one who promises to pay a debt at a certain time, and interest to be compounded as it falls due, can, by payment of the debt or of the interest when it falls due, always avoid the compounding.

These differences between contracts for compound interest and usurious agreements, clearly establish that the former are not in their nature the same with the latter. If they were so, a contract to pay compound interest might render the whole agreement into which it was introduced invalid, so that not even the principal nor simple interest could be recovered, and upon the actual payment of compound interest it could be recovered by the payer, and no subsequent agreement could give such a contract any validity or effect; all of which we have seen is not the case.

Upon the whole, although it seems to be well settled, that compound interest cannot be recovered, as such, even if it be expressly promised, (*f*) we are inclined to think, that the only rule of law against the allowance of compound interest is this; that courts will not lend their aid to enforce its payment, unless upon a promise of the debtor made *after* the interest, upon which interest is demanded, has accrued; and this rule is adopted,

(*f*) Ossulston *v.* Yarmouth, 2 Salk. 449; Waring *v.* Cunliffe, 1 Ves. Jr. 99; Connecticut *v.* Jackson, 1 Johns. Ch. 13; Mowry *v.* Bishop, 5 Paige, 98; Hastings *v.* Wiswall, 8 Mass. 455; Ferry *v.* Ferry, 2 Cush. 92; Rodes *v.* Blythe, 2 B. Mon. 336; Childers *v.* Deane, 4 Rand. 406; Doe *v.* Warren, 7 Greenl. 48. But see Pawling *v.* Pawling, 4 Yeates, 220. But annual rests in merchants' accounts, are allowed. Stoughton *v.* Lynch, 2 Johns. Ch. 210, 214; Barclay *v.* Kennedy, 3 Wash. C. C. 350; Backus *v.* Minor, 3 Calif. 231; but not after mutual dealings have ceased. Denniston *v.* Imbrie, 3 Wash. C. C. 396, 402; Von Hemert *v.* Porter, 11 Met. 210. In cases where it is expressly stipulated that interest shall be payable at certain fixed times, it has been held that interest may be charged upon the interest, from the time it is payable. Kennon *v.* Dickens, 1 Taylor, 231, Cam. & N. 357; Gibbs *v.* Chisolm, 2 Nott & McC. 38; Singleton *v.* Lewis, 2 Hill (S. C.), 408; Doig *v.* Barkley, 3 Rich. 125; Peirce *v.* Rowe, 1 N. H. 179. But it is held otherwise in Ferry *v.* Ferry, 2 Cush. 92; Doe *v.* Warren, 7 Greenl. 48. See 1 American Leading Cases, 341, 37[illegible].

not because such contracts are usurious, or savor of usury, unless very remotely, but upon grounds of public policy, in order to avoid harsh and oppressive accumulations of interest. And for the reason, that this aversion of our law to allow money to *beget* money, has of late years very much diminished, we do not think it absolutely certain, that a bargain in advance for the payment of compound interest, in all its facts reasonable and free from suspicion of oppression, would not be enforced at this day in some of our courts. (*g*)

(*g*) See *Woodbury*, J., Peirce *v.* Rowe, 1 N. H. 183; Pawling *v.* Pawling, 4 Yeates, 220; Kennon *v.* Dickens, Taylor, 235; Gibbs *v.* Chisholm, 2 Nott & McC. 38; Talliaferro *v.* King, 9 Dana, 331.

We add the following Table from the Bankers' Magazine for January, 1855, containing a statement, in a condensed form, of the laws of the several States in relation to interest and usury: —

Legal Rate of Interest.	*Per cent.*	*Penalty for Violation of Usury Laws.*
Maine,	6	Excess not recoverable.
New Hampshire,	6	Forfeit three times the interest.
Vermont,	6	Excess may be recovered back.
Massachusetts,	6	Forfeit three times the whole interest.
Rhode Island,	6	Excess may be recovered by payer.
Connecticut,	6	Forfeiture of all the interest.
New York,	7	Forfeiture of contract.
New Jersey,	6	Forfeiture of contract.
Pennsylvania,	6	Forfeiture of contract.
Delaware,	6	Forfeiture of contract.
Maryland,	6	Excess recoverable by payer.
Virginia,	6	Contract void.
North Carolina,	6	Contract void.
South Carolina,	7	Forfeiture of all the interest.
Georgia,	7	Forfeiture of all the interest.
Alabama,	8	Forfeiture of all the interest.
Arkansas,	6	Contract void.
Florida,	6	Forfeiture of all the interest.
Illinois,	6	Defendant recovers his cost.
Indiana,	6	Fine of five times the whole interest.
Iowa,	6	Forfeiture of excess of interest.
Kentucky,	6	Contract for interest void.
Louisiana,	5	Forfeiture of all the interest.
Michigan,	7	No penalty.
Mississippi,	6	Forfeiture of excess of interest.
Missouri,	6	Forfeiture of excess of interest.
Ohio,	6	Forfeiture of excess of interest.
Tennessee,	6	Liable to indictment for misdemeanor.
Texas,	8	Forfeiture of all the interest.
Wisconsin,	7	Special contracts, 12 per cent.
California,	10	No penalty.

There are various States that permit a higher rate of interest on special contracts, namely: — In Vermont, 7 per cent. may be charged upon railway bonds; in New

Jersey, 7 per cent. may be charged in Jersey City and the township of Hoboken. In Maryland, the penalty is a matter of some doubt, in consequence of a late decision of Judge Taney, which does not, however, meet the assent of the bar of Baltimore; in Arkansas, 10 per cent. may be charged on special contracts; in Illinois, the banks may charge 7 per cent., and 10 per cent. may be charged between individuals on special contracts; in Iowa, 10 per cent. is allowed on special contracts; in Louisiana, 8 per cent. may be so charged; in Michigan, contracts in writing are legal to charge 10 per cent.; the same in Mississippi and Ohio; in Texas, 12 per cent. may be charged on special contracts.

CHAPTER VIII.

DAMAGES.

Sect. 1. — *Of the General Ground and Measure of Damages.*

It has already been remarked, that the common law does not aim at preventing a breach of duty, or compelling the fulfilment of a contract by direct means. This equity does. But, as a general rule, the common law contents itself with requiring him who has done an injury to another, to pay the injured party damages. And even where, as in debt or assumpsit, for a specific sum, the action is, in fact, as Lord *Mansfield* remarked, (*a*) a suit for specific performance, it is not altogether so in form.

The principle which measures damages, at common law, is that of giving compensation for the injury sustained; — a compensation which shall put the injured party in the same position in which he would have stood had he not been injured; (*b*) the simplest form of which occurs where the ground of the action is the wrongful non-payment of money due, and the damages consist of the money, with interest, for the whole period intervening between the refusal and the judgment. But in some instances the law lessens this compensation, leaving upon the injured party a part of his loss; and in others, increases the compensation, by way of punishment to the wrong-doer.

(*a*) "Pecuniary damages upon a contract for payment of money, are, from the nature of the thing, a specific performance." Per Lord *Mansfield*, in Robinson *v.* Bland, 2 Burr. 1077, 1086. See also, Rudder *v.* Price, 1 H. Bl. 547, 554, per Lord *Loughborough*.

(*b*) "*Damna*," says Lord *Coke*, "in the common law hath a special signification for the recompense that is given by the jury to the plaintiff or demandant, for the wrong the defendant hath done unto him." Co. Litt. 257, a.

SECTION II.

OF LIQUIDATED DAMAGES.

The law will permit parties to determine, by an agreemen which enters into the contract, what shall be the damages which he who violates the contract shall pay to the other; but it does not always sanction or enforce the bargain they may make on this subject. Damages thus agreed upon beforehand, when sanctioned by the law, are called liquidated damages. Where the parties make this agreement, but not in such wise that the law adopts it, then the damages thus agreed upon are a penalty, or in the nature of a penalty. And the question whether damages agreed upon are to be treated as liquidated, or as in the nature of a penalty, and therefore reduced to the actual damage, often occurs, and is not always of easy or obvious solution.

By a bond with conditions (an ancient and somewhat peculiar instrument), a party (the obligor) first acknowledges himself bound to another party (the obligee), in a certain sum of money. Then follows an agreement, in the form of a condition, that if the obligor shall do a certain other thing, which may or may not be the payment of other money, the obligation above mentioned shall be void. It is obvious that the primary purpose of the instrument, if the parties are honest, is, that the thing shall be done which is recited in the condition. And the secondary purpose is, that if that thing be not done, the money for which the obligor is bound shall be paid by way of compensation to the obligee, and by way of punishment to the obligor. Hence its name of penalty. And, as in fact, the obligee always took care that the penalty should be high enough to give him full compensation, and operate as a powerful motive upon the obligor, it happened generally, if not always, that the penalty was much more than compensation for the wrong done by a breach of the condition. But the law had no remedy for this;

and one of the earlier of the just and merciful interpositions of the courts of equity, was to reduce the sum mentioned in the penalty to the actual measure of the injury sustained, so as to make it full compensation, but no more. (*c*) The propriety and expediency of this relief were so obvious, that courts of law, aided by statutes, soon applied it, and now, both in England and America, this is constantly done by the courts of law. (*d*) And in this practice, and the reasons for it, we may find principles which aid us in drawing the distinction between liquidated damages and a penalty. For it is obvious, that where parties agree upon the damages to be paid for a breach of contract, whatever name they give to it, they do substantially the same thing which is done by a bond with penalty. And there is no more reason why the courts should regard the agreement, if it opposes reason and justice, in the one case than in the other.

One rule, therefore, is this: that the action of the court shall not be defined and determined by the terms which the parties have seen fit to apply to the sum fixed upon. Though they call it a penalty, or give to it no name at all, it will be treated as liquidated damages, that is, it will be recognized and enforced as the measure of damages, if, from the nature of the agreement and the surrounding circumstances, and in reason and justice it ought to be. (*e*) And although they call it liqui-

(*c*) Tit. Bond and Penalty, Eq. Cas. Abr. 91, 92; Bertie *v.* Falkland, 3 Ch. Cas. 135, per Lord *Somers*.

(*d*) 4 Anne, c. 16, §§ 12, 13. During a short period before this statute, the practice appears to have been this. The defendant, on motion, was allowed to bring the whole amount of the penalty into court, and the proceedings were thereupon stayed. The plaintiff, however, received only the amount of the principal, interest, and costs, and if this did not equal the amount of the penalty, the defendant was allowed to take out the remainder. Ireland's case, 6 Mod. 101; Gregg's case, 2 Salk. 596; Anonymous, 6 Mod. 153. The court said in Burridge *v.* Fortescue, 6 Mod. 60: "It is an equitable motion to be relieved against the penalty."

(*e*) In Sainter *v.* Ferguson, 7 C. B. 716, the defendant agreed not to "practice as surgeon or apothecary, at Macclesfield, or within seven miles thereof, *under a penalty of* £500." It was held, that the £500 was not a penalty, but liquidated damages. *Coltman*, J., said: "Although the word 'penalty,' which would *prima facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of the agreement, and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages." Chamberlain *v.* Bagley, 11 N. H. 234, 240, per *Upham*, J.; Brewster *v.* Edgerly, 13 id. 275; Mundy

dated damages, it will be treated as a penalty, if, from a consideration of the whole contract, it appears that the parties intended it as such, (*f*) or if, where the injury is certain, the sum fixed upon is clearly disproportionate to such injury, and the real claim which grows out of it.

v. Culver, 18 Barb. 336. In Cheddick *v.* Marsh, 1 N. J. 463, 465, *Green*, C. J., said: "If upon the face of the instrument it be doubtful whether the contracting parties intended that the sum specified in the agreement should be a penalty or liquidated damages, the inclination of courts is to consider the contract as creating a penalty to cover the damages actually sustained by a breach of the contract, and not liquidated damages." Bagley *v.* Peddie, 5 Sandf. 192; Crisdee *v.* Bolton, 3 C. & P. 240; Tayloe *v.* Sandiford, 7 Wheat. 13; Shute *v.* Taylor, 5 Met. 61, 67, per *Shaw*, C. J.; Baird *v.* Folliver, 6 Humph. 186. See Lindsay *v.* Amesley, 6 Ired. 186. In Smith *v.* Dickenson, 3 B. & P. 630, the court expressed themselves clearly of opinion, that the word "penalty" being used in the agreement effectually prevented them from considering the sum mentioned as liquidated damages. The bond, in Fletcher *v.* Dyche, 2 T. R. 32, used the words "*forfeit and pay;*" but the sum mentioned was held as liquidated damages. The Supreme Court of the U. S. in Tayloe *v.* Sandiford, 7 Wheat. 13, say this case is clearly distinguishable from a case where the word penalty is used; also per *Marshall*, C. J., "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such, to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves expressly denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their own intention." But in Hodges *v.* King, 7 Met. 583, 588, per *Hubbard*, J.: "The bond has indeed a condition, but that is matter of form, and cannot turn that into a penalty, which, but for the form, is an agreement to pay a precise sum, under certain circumstances." See also, Mercer *v.* Irving, 96, Eng. C. L. 563.

(*f*) In Davies *v.* Penton, 6 B. & C. 216, 224, *Littledale*, J., said: "Before the 8 & 9 Will. 3, the whole penalty might be recovered at law; and the party against whom it was recovered was driven to seek relief in a court of equity. The statute only contains the word 'penalty.' Since the statute, parties in framing agreements, have frequently changed that word for *liquidated damages;* but the mere alteration of the term cannot alter the nature of the thing; and if the court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute. In that case the parties were bound 'in the penal sum of £500, to be recoverable for breach of the said agreement, in any court or courts of law, as and by way of liquidated damages.'" The £500 was held to be a penalty and not *liquidated damages.* See Hoag *v.* McGinnis, 22 Wend. 163. The limitations of this principle appear to be well stated, in Price *v.* Green, 16 M. & W. 346, 354. The defendant was bound in the sum of £5,000, by way of liquidated damages, and not of penalty, not to carry on his trade within certain limits. It was held, that the plaintiff could recover the £5,000 as liquidated damages. *Patterson*, J., said: "Where it is a sum named in respect of the breach of one covenant only, and the intention of the parties is clear and unequivocal, the courts have indeed held, that, in some cases, the words 'liquidated damages' are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named, and, notwithstanding the language used, it is plain from the whole instrument that the real intention was different." Davis *v.* Freeman, 10 Mich 188.

Among the principles which have been found useful in determining this last question, perhaps the two most important and influential are these. The sum agreed upon will be treated as penalty, unless, first, it is payable for an injury of uncertain amount and extent; and second, unless it be payable for one breach of contract, or if for many, unless the damages to arise from each of them are of uncertain amount.

The first rule may be illustrated by a promise to pay one thousand dollars in three months, with an agreement, that if the promisor fails in this payment, he shall pay to the promisee two thousand dollars, by way of liquidated damages. Here it is at once obvious and certain, that this bargain differs in no respect but that of form from a bond with a penalty in a larger sum, conditioned to pay the less; and that it must necessarily be treated in the same way; that is, the penalty must be reduced to the measure of the actual damages. The general reason of this rule is, that where the injury resulting from a breach of contract, is ascertainable at once by computation, or is capable of immediate and exact measurement by other means, so that the parties could have certainly provided for exact compensation, if the sum they agree upon is more than this, it may be presumed that it was really intended as a penalty, or that there was oppression on the one side and weakness or inadvertence on the other; or if not these, that the principle was disregarded, which, alone, the law recognizes as the first measure of damages, that is, the principle of compensation. And the court will do, with the aid of a jury, what the parties have not done; that is, they will apply this principle. (g) But where, among

(g) There has been much conflict in the decisions which have been made upon this class of contracts. While some of the courts have been disposed to apply to them the ordinary rules of construction, and to carry out the intention of the parties, as expressed in the instrument, without regard to its justice, others have been inclined, in almost all cases, to regard the sum fixed upon as a penalty, and to settle themselves, with the aid of a jury, the question of damages, notwithstanding the expressions used by the parties. But the law appears to be now settled, that the courts will apply to these contracts the ordinary rules of construction, and carry out the expressed intentions of the parties, unless one of the two rules laid down in the text is found to apply. The first rule which appears to have been confined to the case in which it is agreed to pay a larger sum of money as liquidated damages, on a failure to pay a smaller sum on a given contingency, was laid down in Orr *v.* Churchill, 1 H. Bl. 227. In that case a high rate of interest was to be paid "by way of penalty," upon a failure to pay over a sum of money, at a fixed time. Lord *Loughborough* said: "Where the question is concerning the non-payment

all the possibilities of injury resulting from a breach of contract, it is impossible to select the certain or probable results, or to

of money, in circumstances like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages; otherwise the law might be eluded by the parties. It may often, indeed, happen, that the damages sustained by the party contracting, by the non-payment of money at the time agreed on, may, by the particular arrangement of his affairs, be greater than the compensation recovered by computing the interest; but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value." The same rule was recognized in Astley *v.* Weldon, 2 B. & P. 346, 354, where *Chambre*, J., said: "There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger." Again, in Kemble *v.* Farren, 6 Bing. 141, 148, *Tindal*, C. J., said: "That a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by a breach of the agreement." But the very late English authorities have shown a decided inclination to disregard this rule, and to carry out the intentions of the parties as expressed in the agreement. See Price *v.* Green, *supra*, n. (*f*). In Galsworthy *v.* Strutt, 1 Exch. 659, 665, *Parke*, B., with Astley *v.* Weldon, and Kemble *v.* Farren before him, said: "I take it that it would be competent for the parties to make a stipulation for the payment of a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done I do not see how the courts can avoid giving effect to such a contract." But in this country the rule, as stated in the text and in the earlier cases, appears to be generally recognized. In Gray *v.* Crosby, 18 Johns. 219, 226, *Woodworth*, J., in remarking upon a case where a party covenanted on a certain contingency to pay a sum of money, with proviso that if he refused, he was then to pay a larger sum as liquidated damages, said: "Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were, they might afford a sure protection for usury, and countenance oppression under the forms of law." See Bagley *v.* Peddie, 5 Sandf. 192; Williams *v.* Dakin, 22 Wend. 211, per *Walworth*, Ch.; Hoag *v.* McGinnis, id. 163; Heard *v.* Bowers, 23 Pick. 455, 462; Sessions *v.* Richmond, 1 R. I. 298, 303; Plummer *v.* McKean, 2 Stewart, 423. But see Jordan *v.* Lewis, id. 426. This rule has also received the sanction of the Superior Court of New Hampshire, although that court has generally been decidedly in favor of applying the ordinary principles of construction to agreements for the liquidation of damages. Thus, in Mead *v.* Wheeler, 13 N. H. 351, 353, *Gilchrist*, J., said: "It is settled that when there is an agreement to pay a large sum, if the party fail to pay a smaller sum, the agreement to pay the penalty cannot be enforced beyond the amount of legal interest. Although in fact the creditor may suffer the most serious injury from the want of punctual payment of his debt, and the payment of principal and interest may very inadequately compensate him for his disappointment, still, the payment of more than legal interest cannot be enforced under the denomination of a penalty, although, if the agreement to pay a penalty be in accordance with the general usage and practice of a particular trade, it has been held that it might be enforced, even if it should exceed the legal interest. Floyer *v.* Edwards, Cowper, 112; *Ex parte* Aynsworth, 4 Ves. 678. The payment of money being the thing to be done, as money is the only measure of damages, no closer approximation to the damages sustained can be made, than to estimate them at the sum agreed to be paid, and the interest thereon. This consideration, with the necessity of enforcing the laws against usury, affords perhaps as good a reason why the party should be compelled to pay no more than the sum specified, and the interest, as the iniquity of his paying a large sum for the omission to pay a smaller sum." In establishing this rule, the court seem to have been influenced more or less by a desire to prevent

define them with any precision by reference to a money standard, here the parties may agree beforehand what the injury shall be valued at, or what shall be taken for a compensation; for if the court sets it aside, it can only do what it may be supposed the parties had a right to do and have done, and that is, arrive at a general probability, by a consideration of all the circumstances of the case. Such an agreement, therefore, the court will not set aside, unless for such obvious excess and disproportion to all rational expectation of injury, as make it certain that the principle of compensation was wholly disregarded.

The second rule is derived from similar considerations. Let us suppose a contract between parties, one of whom, for good consideration, promises to the other to do several things, and then it is agreed that the promisor shall pay, by way of liquidated damages, a large sum, if the promisee recover against him in an action for a breach of this contract. It must be supposed that this sum is intended and regarded as adequate compensation for a breach of the whole contract; for it is all that the promisor is to pay if he breaks the whole. It would, of course, be most unjust and oppressive to require of him to pay this whole sum, for violating any one of the least important items of the contract. But such would be the effect if the words of the parties prevailed over the justice of the case. The sum to be paid would, therefore, be treated as a penalty, and reduced accordingly, unless the agreement provided that it should be paid only when the whole contract was broken, or so much of it as to leave the remainder of no value; or unless the sum agreed upon was broken up into parts, and to each breach of the contract its appropriate part assigned; and the sum or sums payable came in other respects within the principles of liquidated damages. (*h*)

an evasion of the statutes against usury. But as it is settled that this class of cases does not come within these statutes, Cutler *v.* How, 8 Mass. 257; Floyer *v.* Edwards, Cowp. 112, 115, per Lord *Mansfield;* we think the rule may more safely rest upon the grounds taken in the text, than upon considerations of that nature.

(*h*) In Astley *v.* Weldon, 2 B. & P. 346, 353, Heath, J., said: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty." The subsequent case of Reilly *v.* Jones, 1 Bing. 302, has been thought

With the exception of these rules of construction, which seem to have grown out of the peculiar nature of this class of con-

inconsistent with this principle, but it was not so considered by the court, but the sum mentioned was held to be liquidated damages, because it was so called by the parties, and the agreement was in substance for the performance *of one thing only*. See Barton *v.* Glover, Holt, N. P. 43. In Kemble *v.* Farren, 6 Bing. 141, the action was assumpsit, by the manager of Covent Garden Theatre, against an actor, to recover liquidated damages for the violation of an engagement to perform. There were several stipulations, of various degrees of importance, on each side, "*some sounding in uncertain damages, others relating to certain pecuniary payments;* and the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said engagement, *or any part thereof, or any stipulation therein contained*, such party should pay to the other the sum of £1,000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*" Notwithstanding the strong expressions used by the parties, the sum was held to be a penalty, and not liquidated damages. But *Tindal*, C. J., said: "If the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages, upon any such breach, at £1,000; thus restricting the application of the general rule cited above, from Astley *v.* Weldon, to cases in which some of the stipulations are of certain nature and amount." This decision has been followed in England, in Edwards *v.* Williams, 5 Taunt. 247; Crisdee *v.* Bolton, 3 C. & P. 240, 243; Boys *v.* Ancell, 5 Bing. N. C. 390, 7 Scott, 364; Street *v.* Rigby, 6 Ves. 815; Beckham *v.* Drake, 8 M. & W. 846, 853; Horner *v.* Flintoff, 9 id. 678; Galsworthy *v.* Strutt, 1 Exch. 659; Atkyns *v.* Kinnier, 4 Exch. 776. The present state of the law in England may be gathered from the following remarks of *Parke*, B., in Atkyns *v.* Kinnier: "The rule of law, as laid down in Kemble *v.* Farren (which I cannot help thinking was somewhat stretched) was that although the parties used the words 'liquidated damages,' yet, when the context was looked at, it was impossible to say that they intended that the amount named should be other than a penalty, inasmuch as the agreement contained various stipulations, some of which were capable of being measured by a precise sum, and others not; as, for instance, the plaintiff was to pay the defendant a certain weekly salary, which was capable of being strictly measured, and was far below £1,000; therefore, upon a reasonable construction of the covenant, the words 'liquidated damages' were to be rejected, and the amount treated as a penalty. That decision has since been acted upon in several cases, and I do not mean to dispute its authority. Therefore, if a party agrees to pay £1,000, on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract, consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty. In this case there is no pecuniary stipulation, for which a sum certain, of less amount than £1,000, is to be paid, but all the stipulations are of uncertain value. Possibly this may have been a very imprudent contract for the defendant to make; but with that we have nothing to do. Upon the true construction of the deed, the amount is payable by way of liquidated damages, and not as penalty." The decision of Kemble *v.* Farren was questioned by *Gilchrist*, J., in Brewster *v.* Edgerly, 13 N. H. 275, 278, but it has been generally recognized in this country as sound law. Williams *v.* Dakin, 17 Wend. 447, 455, 22 Wend. 201, 212; Niver *v.* Rossman, 18 Barb. 50; Jackson *v.* Baker, 2 Edw. Ch. 471; Heard *v.* Bowers, 23 Pick. 455; Shute *v.* Taylor, 5 Met. 61, 67, per *Shaw*, C. J.; Moore *v.* Platte Co. 8 Mo. 467; Gower *v.* Saltmarsh, 11 Mo. 271; Carpenter *v.* Lockhart, 1 Cart. (Ind.), 434, 443; Bright *v.* Rowland, 3 How. (Miss.), 398, 413; Cheddick *v.* Marsh, 1 N. J. 463; Curry *v.* Larer, 7 Penn. St. 470. In the late cases of Beale *v.* Hayes, 5 Sandf. 640, and Bagley *v.* Peddie, id. 192, this question has been ably discussed, and this rule established. The case of

tracts, courts are guided by the intentions of the parties in determining whether the sum contracted to be paid upon the non-performance of a covenant is to be considered as liquidated damages, to be enforced according to the terms of the agreement, or as a penalty to be controlled by an assessment of damages by a jury; and in ascertaining these intentions of the contracting parties, the ordinary rules of construction are applied. (*i*)

Beale *v.* Hayes arose out of a theatrical engagement, and was not distinguishable in its material facts from Kemble *v.* Farren, *supra*, which the court followed in deciding the case. In Bagley *v.* Peddie, the defendants were bound to pay "three thousand dollars, liquidated damages," in case A., one of the defendants, should refuse to continue with, or serve the plaintiff, or should violate any of several other covenants contained in the agreements. Some of the covenants were clearly "certain in their nature, and the damages for their breach could be readily ascertained by a jury." The sum was held to be a penalty. *Sandford*, J., in delivering a very able opinion, said: "The courts have leaned very hard in favor of construing covenants of this kind to be in the nature of penalties, instead of damages, fixed and stipulated between the parties; and in so doing have established certain rules which will serve to guide us in determining this case. It may, perhaps, be justly said, that in this struggle to relieve parties from what, on a different construction, would be most improvident and absurd agreements, the courts have sometimes gone very far towards making new contracts for them, somewhat varied from the stipulations, which, under other circumstances would be deduced from the language they used; but we believe no common-law court has yet gone so far as to reduce the damages conceded to have been liquidated and stipulated between the parties, to such an amount as the judges deem reasonable, which is the course in countries where the civil law prevails. Among the principles that appear to be well established, are these: 1. Where it is doubtful, on the face of the instrument, whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter. 2. On the contrary, where the language used is clear and explicit, to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereafter mentioned. 3. If the instrument provide that a larger sum shall be paid, on the failure of the party to pay a less sum, in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it. 4. When the covenant is for the performance of a single act, or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any such covenants, that sum is to be deemed liquidated damages, and not a penalty. The cases of Reilly *v.* Jones, 1 Bing. 302; Smith *v.* Smith, 4 Wend. 468; Knapp *v.* Maltby, 13 id. 587; and Dakin *v.* Williams, 17 id. 447, s. c. in error, 22 id. 201, were of this class. 5. Where the agreement secures the performance, or omission, of various acts, of the kind mentioned in the last proposition, together with one or more acts, in respect of which the damages on a breach of the covenant, are certain, or readily ascertainable by a jury, and there is a sum stipulated as damages, to be paid by each party to the other, for a breach of any one of the covenants, such sum is held to be a penalty merely." A clause in an agreement by H. to repair certain houses for the sum of $1,500, and to have them completed fit for occupancy by December 1st, which provides, that "for each and every day's delay in the completion of said houses after December 1st, said H. shall forfeit five dollars," is to be construed as fixing the amount of liquidated damages, and not as a penalty. Hall *v.* Crowley, 5 Allen, 304.

(*i*) In Perkins *v.* Lyman, 11 Mass. 76, 81, the court said: "The question whether a sum of money mentioned in an agreement shall be considered as a penalty, and so subject to the chancery powers of this court, or as damages liquidated by

SECTION III.

OF CIRCUMSTANCES WHICH INCREASE OR LESSEN DAMAGES.

We have said that the principle of *compensation* is that which lies at the foundation of the common-law measurement of damages. And this is not the less true, although there are difficulties in the application of this principle, and exact and adequate compensation is seldom the result of a lawsuit. Thus, the expenses of reaching this result, as counsel fees and the like, and the labor and anxiety even of successful litigation, are not often compensated, in fact, although the theory of the law, perhaps, includes so much of this as is actual labor and expense, in the costs recovered. (*j*) In some suits, especially in those for

the parties, is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract provable by a written instrument, arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively." The fact that the amount of the damages is uncertain, and cannot easily be determined by a jury, inclines the courts to treat the sum fixed upon as liquidated damages. Sainter *v.* Ferguson, 7 C. B. 716; Fletcher *v.* Dyche, 2 T. R. 32; Gammon *v.* Howe, 14 Me. 250; Tingley *v.* Cutler, 7 Conn. 291; Mott *v.* Mott, 11 Barb. 127. See Lowe *v.* Peers, 4 Burr. 2225; Smith *v.* Smith, 4 Wend. 468. If the payment of the money appears to have been intended only to secure the performance of the main object of the agreement, the courts incline to hold it a penalty. Sloman *v.* Walter, 1 Bro. Ch. 418; Graham *v.* Bickham, 4 Dall. 149; Merrill *v.* Merrill, 15 Mass. 488.

(*j*) In the theory of the law the taxed costs are full indemnity for the expenses of a suit. In Doe *v.* Filliter, 13 M. & W. 47, in an action of trespass for mesne profits, the question was, whether the plaintiff was entitled to full costs, in the action of ejectment, as between attorney and client, or whether the taxed costs were to be considered as a full indemnity. The court held the latter. *Alderson*, B., said: "The taxed costs are intended to be a full indemnity to the plaintiff for his expenses in getting back the land. That is the principle; whether it be fully carried out in practice, is another matter. The question is, what is to be the criterion by which the costs of getting back land are to be estimated? A plaintiff in ejectment is in the same situation as other suitors, all of whom sue for their rights, and obtain costs as an indemnity; and as other plaintiffs submit to have their costs taxed, so ought a plaintiff in ejectment. If the taxed costs are not a full indemnity, they ought to be made so." But in cases where the costs are not taxed, the plaintiff may recover his full expenses. Grace *v.* Morgan, 2 Bing. N. C. 534; Doe *v.* Filliter, *supra*, per *Pollock*, C. B. In Admiralty courts, where the costs are at the discretion of the judge, counsel fees and the full expenses of litigation are often allowed. The Amiable Nancy, 3 Wheat. 546; The Venus, 5 Wheat. 127; The

the infringement of patents, the magnitude of the expense, in proportion to the sum recoverable in the suit itself, has led some courts to allow juries to include this expense in their verdicts; but we cannot think this legal. (*k*) The principle of compensation has, nevertheless, great power, and courts now seek to apply it to the measurement of damages even more than formerly. One of its consequences is, that the plaintiff can, generally, recover, according to his proof, more or less than the amount

Appollon, 9 id. 362; Canter *v.* American and Ocean Ins. Co. 3 Pet. 307. And in the common-law courts, even in cases where the costs are taxed, this theory has not always been acted upon. In actions on covenants of warranty, and of seisin in the sale of real estate, the reasonable expenses of defending a previous suit for the recovery of the property, consisting of counsel fees and the like, have been recovered. Staats *v.* Ten Eyck, 3 Caines, 111; Pitcher *v.* Livingston, 4 Johns. 1; Waldo *v.* Long, 7 id. 173; Sumner *v.* Williams, 8 Mass. 162; Swett *v.* Patrick, 3 Fairf. 9; Hardy *v.* Nelson, 27 Me. 525. But see Leffingwell *v.* Elliott, 10 Pick. 204; Robinson *v.* Bakewell, 25 Penn. St. 424. So the expenses of defending a prior suit, on a breach of an implied warranty of title, on the sale of personal property, were allowed in Kingsbury *v.* Smith, 13 N. H. 109; but in Armstrong *v.* Percy, 5 Wend. 535, the courts refused to allow more than the taxed costs. See Blasdale *v.* Babcock, 1 Johns. 518; Lewis *v.* Peake, 7 Taunt. 153. In actions on the case and trespass, juries have sometimes been allowed, in assessing damages, to take into consideration counsel fees and other reasonable expenses in prosecuting the suit. Linsley *v.* Bushnell, 15 Conn. 225, *Waite*, J., dissenting; Noyes *v.* Ward, 19 id. 250; Marshall *v.* Betner, 17 Ala. 832; Whipple *v.* Cumberland Manuf. Co. 2 Story, 661; Thurston *v.* Martin, 5 Mason, 497. And see Ah Thaie *v.* Quan Wan, 3 Cal. 216. But the weight of authority appears to be against such allowance. Barnard *v.* Poor, 21 Pick. 378; Lincoln *v.* S. & S. R. R. Co. 23 Wend. 425; Good *v.* Mylin, 8 Barr, 51, overruling Wilt *v.* Vickers, 8 Watts, 235, and Rogers *v.* Fales, 5 Barr, 154, 159; Young *v.* Turner, 4 Blackf. 277. The authority of Whipple *v.* Cumberland Manuf. Co., and Thurston *v.* Martin, is overthrown in the late case of Day *v.* Woodworth, 13 How. 363, where Barnard *v.* Poor, and Lincoln *v.* S. & S. R. R. Co. were approved, and what appears to be the true rule was stated by *Grier*, J., who, after asserting that vindictive or exemplary damages may be given in certain cases, adds: "It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."

(*k*) Counsel fees and other expenses were allowed in Boston Manuf. Co. *v.* Fiske, 2 Mason, 120; Pierson *v.* Eagle Screw Co. 3 Story, 402; Allen *v.* Blunt, 2 Woodb. & M. 121. But the authority of these is much shaken, if not overthrown, in Stimpson *v.* The Railroads, 1 Wallace, Jr. 164, and by a dictum in Day *v.* Woodworth, 13 How. 372, where *Grier*, J., said: "The only instance in which this power of increasing the 'actual damage' is given by statute, is in the Patent Laws of the United States. But there it is given to the court and not to the jury. The jury must find the 'actual damages' incurred by the plaintiff at the time his suit was brought, and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary trouble and expense to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant, over and above the taxed costs, are usually as great as those of the plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond taxed costs."

specified in his declaration. (*l*) The only absolute limitation being the amount of the *ad damnum* which cannot be exceeded. (*m*) We shall recur to this question, of including expenses in damages, again.

Another effect is, that circumstances may be shown, in mitigation, or in aggravation of the damages, which did, or do, in fact, mitigate or aggravate the injury; and, as we think, only these. (*n*) We are not now speaking of exemplary or vindictive damages. And in cases which do not raise this question, evidence of the defendant's motives, or of any thing which affects only the moral character of the transaction, ought not to be admitted, or to have any weight with the jury. The intention, therefore, is not an element in the case, unless it belongs directly to the issue. That is, the intention should not be shown by either party, to increase or lessen the damages, unless a bad purpose is one of the allegations of the plaintiff, expressly, or by implication of the law, because necessarily involved in the allegations. (*o*) Or, perhaps, unless a part of the case consists of words or acts which are harmless, if they are said or done as the manifestation of one intention or feeling, and injurious, if of another. (*p*)

Compensation for injuries to property, or for a breach of contract in relation to property, is far more easily measured by money, than when it is sought for an injury to the person or reputation. Nevertheless, it is compensation only which is to be given; and the jury must measure this as well as they can, taking into consideration the whole injury which was sustained, and all its parts; as suffering, bodily, and mentally, loss of time, or of money, or of labor, and the many mischiefs which ensue

(*l*) Hutchins *v.* Adams, 3 Greenl. 174; Gould's Pleading, Ch. 4, § 37.

(*m*) Hoblins *v.* Kimble, 1 Bulst. 49; Bac. Abr. tit. Damages; Curtiss *v.* Lawrence, 17 Johns. 111; Fish *v.* Dodge, 4 Denio, 311; Fournier *v.* Faggott, 3 Scam. 347; Cameron *v.* Boyle, 2 Greene (Iowa), 154; Palmer *v.* Reynolds, 3 Cal. 396; Day *v.* Berkshire Woollen Co. 1 Gray, 420. De Costa *v.* Mass. Mining Co. 17 Cal. 613.

(*n*) See 3 Am. Jurist, 287, where this question is discussed with great learning and ability, by Mr. Justice *Metcalf.*

(*o*) As in actions for malicious prosecution. Jones *v.* Gwynn, 10 Mod. 148; Wiggin *v.* Coffin, 3 Story, 1.

(*p*) Weatherston *v.* Hawkins, 1 T. R. 110; Rogers *v.* Clifton, 3 B. & P. 587. See Bromage *v.* Prosser, 4 B. & C. 247.

from a loss of reputation, in a community where one without a reputation is in effect an outlaw.

The bodily pain resulting from an injury is always to be considered in estimating damages. (q) But mere mental suffering seems, in the cases, to be generally disregarded, unless the injury be wanton and malicious. (r) Where a contract is broken under aggravating circumstances, these may sometimes be given in evidence to increase the damages. (s) In general, however the intention is not regarded; for it seems to be the rule of the common law, that a man suffers the same injury from an actual trespass, whether it was intentional or not; that is, the same amount of what the law calls injury, when inquiring what shall be compensated. (t) Hence a lunatic has been held liable for the injury he inflicted. (u) But, in such a case, nothing can enter into the damages which savors of a vindictive or exemplary character. (v) If circumstances are admitted in aggravation of damages which did not aggravate the injury, a wrong is

(q) Morse *v.* Auburn & S. R. R. Co. 10 Barb. 621; Beardsley *v.* Swann, 4 McLean, 333.

(r) Flemington *v.* Smithers, 2 C. & P. 292; Blake *v.* Midland R. Co. 18 Q. B. 93, 10 Eng. L. & Eq. 437. See Morse *v.* Auburn & S. R. R. Co. 10 Barb. 621. In suits against common carriers, damages for pain of mind are said to be recoverable, in Fairchild *v.* Cal. Stage Co. 13 Cal. 599. See *contra,* Masters *v.* Warren, 27 Conn. 293.

(s) In Coppin *v.* Braithwaite, 8 Jur. 875, the action was assumpsit on a contract to carry the plaintiff in a ship from London to Sheerness. It was alleged, as a breach, that the defendants, by their agents, caused the plaintiff to be disembarked at an intermediate port, in a scandalous and disgraceful manner, and used towards him contemptuous and insulting language. It was held, that these aggravating circumstances could be shown to increase the damages. *Parke,* B., said: "With respect to what was said by the captain, at the time of turning the plaintiff out of the vessel, I think it was properly received. There can be no doubt that the defendants are liable for every thing done in breach of the contract by the captain, acting as their servant. The breach of contract, alleged in the declaration, is the refusing to carry the plaintiff in the ship, and turning him out of it in a contemptuous manner, before the termination of the voyage. The turning him out is part of the breach, and the mode of turning him out is part of the evidence in the case. A contract is broken, and it is quite impossible to exclude from the view of the jury the circumstances under which it was broken. Surely, it would make a most material difference if the contract were broken because it would be inconvenient to carry him to his journey's end, and if he were turned out under circumstances of aggravation. Suppose, instead of a man landed at Gravesend from a steamboat, this had been the case of a passenger in a ship bound to the West Indies, and that he were put ashore on a desert island, without food, or exposed to the burning sun and the danger of wild beasts, or even landed among savages; would not evidence be receivable to show the state of the island where he was left, and the circumstances attending the violation of the contract?"

(t) 3 Am. Jurist, 391, *et seq.;* Lambert *v.* Bessey, T. Raym. 421; James *v.* Campbell, 5 C. & P. 372; Hay *v.* The Cohoes Co. 3 Barb. 42; M'Bride *v.* M'Laughlin, 5 Watts, 376.

(u) Morse *v.* Crawford, 17 Vt. 499.

(v) Krom *v.* Schoonmaker, 3 Barb. 647.

done. But there are cases in which circumstances may be admitted, that show the true character of the facts which constitute the injury, and may thus, in effect, aggravate the damages, although they formed no part of the injury complained of. Thus in an action of slander, it has been said that the plaintiff may prove, in aggravation of damages, other words than those he sets forth as constituting the slander. This we think very doubtful in point of law and of right. But he may show other words, in order to illustrate and make apparent the meaning, character, and effect of the words which he alleges. These other words may inflict other and further injury, but must not be used or considered by the jury for the purpose of increasing the damages to be rendered in this action, because damages for those very words may be recovered in an action founded upon them. It seems reasonable, however, that a jury may use these other words in explanation of those declared upon, although a distinct action may be brought upon them, provided they are not permitted to be considered as increasing the injury inflicted by the words declared on, and so of increasing the damages. (*w*)

(*w*) There is much diversity in the English Nisi Prius decisions, upon the questions arising relative to the introduction of other words than those for which the action is brought, as evidence in suits for slander or libel. The subject was first thoroughly considered in Westminster Hall, in the late case of Pearson *v.* Lemaitre, 5 Man. & G. 700, 6 Scott, N. R. 607, where the Nisi Prius decisions were cited and commented on by counsel. The action was for libel, and the communication was not equivocal, or *prima facie* privileged, so that express malice need be shown, in order to maintain the action. It was held, that other communications, containing in substance a repetition of the same libellous matter, and published after the suit was brought, and in themselves actionable, could be introduced to show that the defendant was actuated by malice in fact. *Tindal*, C. J., said: "And this appears to us to be the correct rule, viz., that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And, if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. . . . Upon principle, we think that the *spirit and intention* of the party publishing a libel, are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded, simply because it may disclose another and different cause of action." The law does not appear to be settled in this country. In Thomas *v.* Crosswell, 7 Johns. 264, and Inman *v.* Foster, 8 Wend. 602, it was held, in the first case, that in actions for libel the plaintiff may give in evidence other publications which are not libellous; and in the second case, that in actions for verbal slander, the plaintiff may prove other slanderous words, where the statute of limitations has run as to those words. And in Root *v.* Lowndes, 6 Hill, 518, in a case where malice was implied by law, the court held that the repetition of the same words should be received, but would not allow the plaintiff to prove any words which might be the subject of another

SECTION IV.

OF EXEMPLARY AND VINDICTIVE DAMAGES.

Whether damages may be vindictive or exemplary, in the strict sense of these words, that is, whether in actions *ex delicto* (to which it is generally admitted that exemplary damages must be confined), (*x*) after a jury have gone to the full length of adequate compensation for the whole injury sustained by the plaintiff, the law authorizes them to begin anew, and add to these damages something more by way of punishment to the defendant, is a grave and difficult question, and high authorities stand ranged upon the affirmative and negative. On the one hand, it is said that there is nothing punitive in the nature of civil actions, and that if any thing of the kind enters into them, it is an error or an abuse which does the great mischief of confounding two perfectly distinct jurisdictions. If one man sues for an injury, it should not enter into *his* compensation that the wrong done was of bad example and injurious effect to others; for if so, others who are injured can sue also; and if beyond the injury which can be reached thus, there lies a mass of general wrong which no one man can take hold of, let the State come with its criminal process. But if these two things are mingled, then the civil process for remedy and compensation loses its just

action. See Keenholts *v.* Becker, 3 Denio, 346; Kendall *v.* Stone, 2 Sandf. 269. In Bodwell *v.* Swan, 3 Pick. 376, it was held, that a repetition of the words for which the action was brought, or the uttering of words of similar import, might be given in evidence, to show that the first uttering of the words was malicious. But the court also declared that they could go no further, and that they could not permit a distinct calumny, uttered by the defendant, to be given in evidence to prove his malice in speaking the words for which the action was brought. See Watson *v.* Moore, 2 Cush. 133. In Wallis *v.* Mease, 3 Binney, 546, it was held, that other words than those in the declaration could be introduced to show malice, but that the damages must be given for those words only for which the action was brought. See Keen *v.* M'Laughlin, 2 S. & R. 469. In Schoonover *v.* Rowe, 7 Blackf. 202, it was held, that a repetition of the same words since the commencement of the suit, should not be taken into consideration in assessing damages, although they might be given to show malice. See Burson *v.* Edwards, 1 Smith, (Ind.), 7; Ridgden *v.* Walcott, 6 Gill & J. 413; Wagner *v.* Holbrunner, 7 Gill, 296.

(*x*) See Coppin *v.* Braithwaite, 8 Jurist, 875, cited *supra*, n. (*s*).

measure, and the criminal process is either not applied, or is made inefficient, by the fact that its work is done, however imperfectly, elsewhere.

On the other hand, it was distinctly asserted, so long ago as by Lord *Camden*, that "damages are *designed* not only as a satisfaction to the injured person, but *as a punishment to the guilty*." (*y*) And as all law should have for its constant end the prevention of wrong, the principle of punishment may well be mingled with that of compensation, in order to effect this purpose. And on this subject authorities are so numerous, so various, and so strong, that it must be conceded as a nearly established rule of law, that in certain cases, as in actions for libel, slander, assault and battery, false imprisonment, malicious prosecution, seduction, and the like, the jury may give some damages for the purpose of punishment, which on other grounds they would not give. (*z*)

In regard to the authorities, it may be confessed, that by far the greater part are *obiter*, and some of them quite uncalled for; and that of some of those which would have most weight, the meaning is qualified and explained by other expressions used, or greatly restrained by the facts of the case. Moreover, in nearly all cases in which there is such malice as will allow the giving of exemplary damages, there is some insult or injury to the feelings for which the damages cannot be assessed by any definite rule. Hence it may be difficult to show, in any particular case, that damages have been allowed beyond the amount of the pecuniary loss and the injury to the person and to the feelings, unless we rely upon the precise words used in the instructions of the court. But with all allowance, there remain positive adjudications, and distinct and emphatic assertions, which go very far indeed to establish the lawfulness, in certain cases, of vindictive damages.

(*y*) 5 Campbell's Lives of the Lord Chancellors, 207.

(*z*) This question has been ably argued on the side against allowing exemplary damages, in 3 Am. Jurist, 287, by Hon. Theron Metcalf, and in the Law Reporter for April, '47, and in 2 Greenl. Ev. § 253, note, by Mr. Greenleaf: and on the other side, in the Law Reporter for June, 1847, and in Sedgwick on the Measure of Damages, by Mr. Sedgwick. The two articles in the Law Reporter are also published in the Appendix to the second edition of Sedgwick on the Measure of Damages.

We cannot believe that it was ever a principle of the ancient and genuine common law, that damages should be punishment, or that the civil remedy for a wrong done should be punitive to the wrongdoer as well as compensative to the sufferer. Damages were not, originally, at least, *designed* for any such purpose. But it may still be a question whether the introduction of this principle, to a certain extent, and in certain cases, may not rest on good reasons, as well as good authorities. The common law is not perfect, nor so unwise as to call itself perfect. It has its civil process for compensation, and its criminal process for punishment, and it wisely demands that these should be kept distinct. But it might not be wise to insist that the work of punishment should not be done at all, or should be done very imperfectly, because the proper criminal process is unequal to the requirements of some cases, although this work can be well and adequately done by the civil process in precisely these cases. There are many wrongs, "*pessimi exempli*," of which the interest of the community demands the prevention, but which criminal process cannot reach at all, or cannot punish with any adequacy. The crime of seduction, sometimes worse in the character which it indicates, and in the injury which it inflicts, than murder, is one which criminal law cannot touch; and very many cases where a very great injury is compounded of elements which the criminal law, if it does not ignore, does not profess to regard as important, illustrate the occasional insufficiency of this branch of law. What good reason is there why what it cannot do, although it ought to be done, should not be done for it, by a collateral branch of the law? In the action for seduction, which must be brought for loss of service, or for a trespass *quare clausum*, laying the seduction only as an incident, the law first requires that the service, or the trespass, should be proved; but when this formal requirement is proved, it is forgotten, and the damages are measured by a totally different standard. It may be said, that here only the substantial *gravamen* is made the measure of compensation, instead of the formal *gravamen*. But it seems to be a rule in modern times, that when, in such a case, or at least in an action for breach of promise of marriage, a defendant defends himself by impeach-

ing the character of the woman, which he may do, if he makes this a distinct point of his defence and then fails in the proof of it on the trial, the jury may consider this attempt as good cause for swelling the damages. Such ruling recommends itself to our moral feelings, and to a sense of right and justice; but it would be very difficult to maintain it as a rule of law, on any other than the punitive principle. (*a*)

It is unfortunate that the word "vindictive" has been used as descriptive of these damages; "exemplary" is much better. For, on the whole, we are satisfied that the courts of this country generally permit a jury to give, in certain cases, damages which exceed the measure of legal compensation, and are justified by the principle that one found guilty of so great an offence should be made an example of, in order to deter others from the like wrong-doing. (*b*) In New Hampshire, (*c*) Connecticut, (*d*) New York, (*e*) Pennsylvania, (*f*) Alabama, (*g*) and Louisiana, (*h*) this has been distinctly asserted, and the Su-

(*a*) See vol. II. p. 69, note, (*j*)

(*b*) There are numerous English cases in which it has been held, that juries may give exemplary damages; — as in trespass for assault and imprisonment, under a general warrant issued by the Secretary of State, Huckle *v.* Money, 2 Wilson, 205; — in trespass *quare clausum fregit* for entering the plaintiff's land, firing at game, and using intemperate language, Merest *v.* Harvey, 5 Taunt. 442; — in trespass *quare clausum fregit* for entering the plaintiff's close, and poisoning the plaintiff's poultry, Sears *v.* Lyons, 2 Stark. 317; — in trespass for debauching the plaintiff's daughter, Tullidge *v.* Wade, 3 Wilson, 18. In Doe *v.* Filliter, 13 M. & W. 47, it was said: "In actions for malicious injuries, juries have been allowed to give vindictive damages and to take all the circumstances into consideration." In Brewer *v.* Dew, 11 M. & W. 625, it was *held*, that vindictive damages might be given in an action of trespass, for seizing the plaintiff's goods under a false and unfounded claim, whereby he was prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house.

(*c*) Sinclair *v.* Tarbox, 2 N. H. 135; Whipple *v.* Walpole, 10 id. 130.

(*d*) Linsley *v.* Bushnell, 15 Conn. 225; Huntley *v.* Bacon, 15 id. 273.

(*e*) Tillotson *v.* Cheetham, 3 Johns. 56; Woert *v.* Jenkins, 14 id. 352; King *v.* Root, 4 Wend. 113, 139; Brizsee *v.* Maybee, 21 Wend. 144, where exemplary damages were allowed in an action of replevin; Tifft *v.* Culver, *3 Hill, 180; Kendall *v.* Stone, 2 Sandf. 292. See the able argument of counsel in Kendall *v.* Stone, 1 Seld. 14.

(*f*) Sommer *v.* Wilt, 4 S. & R. 19; M'Bride *v.* M'Laughlin, 5 Watts, 375; Phillips *v.* Lawrence, 6 Watts & S. 154; Amer *v.* Longstreth, 10 Penn. St. 148.

(*g*) Donnell *v.* Jones, 13 Ala. 490, 502; Ivey *v.* McQueen, 17 id. 408; Mitchell *v.* Billingsley, 17 id. 391.

(*h*) Nelson *v.* Morgan, 2 Mart. (La.), 256; Gaulden *v.* McPhaul, 4 La. An. 79. Exemplary damages are also allowed in Kentucky; Jennings *v.* Maddox, 8 B. Mon. 430; — in Illinois, Grable *v.* Margrave, 3 Scam. 372; McNamara *v.* King, 2 Gilman, 432; — in North Carolina, Wylie *v.* Smitherman, 8 Ired. 236; Gilreath *v.* Allen, 10 Ired. 67; — in South Carolina, Spikes *v.* English, 4 Strobh. 34; — in Delaware, Steamboat Co. *v.* Whillden, 4 Harring. 228; Jefferson *v.* Adams, id. 321; Cummings *v.* Spruance, id. 315; — in Missouri, Milburn *v.* Beach, 4 Mo. 104. See Chiles *v.* Drake, 2 Met. (Ky.), 146, where the court say, that *punitive, vindictive*, and *exemplary*, are synonymous terms as applied to damages.

preme Court of the United States has positively and emphatically recognized "exemplary damages" as lawful. (*i*) It has been held in Pennsylvania, that the jury, and not the court, are to determine whether exemplary damages are proper upon the evidence before them. (*j*) We should prefer to say, that the court must state as matter of law, in what kinds or classes of cases such damages may be given, and that the jury may then decide whether the case before them is of that kind or class. And we are not aware of any authoritative and direct judicial decision which declares that such damages are never lawful. But, at the same time, we think there is a growing caution as to the application of this rule, and, perhaps, a tendency to restrict it to cases in which the direct criminal process fails wholly or in a good degree, and not to allow it to justify an excessive and unreasonable enlargement of damages. (*k*) It has been held, that the rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law, acting under color of process, as to private persons. (*l*)

(*i*) In Day *v.* Woodworth, 13 How. 363, the action was trespass for pulling down a mill-dam. *Grier*, J., in delivering the opinion of the court, said: "It is a well-established principle of the common law, that in actions of trespass, and all actions upon the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common, as well as by statute law, men are often punished for aggravated misconduct, or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary, or vindictive, rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit the juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further, by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." See also, Conard *v.* Pacific Ins. Co. 6 Pet. 262; Walker *v.* Smith, 1 Wash. C. C. 152; Boston Manuf. Co. *v.* Fiske, 2 Mason, 120; Stimpson *v.* The Railroads, 1 Wallace, Jr. 164; Ralston *v.* The State Rights, Crabbe, 22.

(*j*) Nagle *v.* Mallison, 34 Penn. St. 48.

(*k*) In Austin *v.* Wilson, 4 Cush. 273, it was held, that exemplary damages could not be recovered in an action for an injury which is also punishable by indictment. *Metcalf*, J., in delivering the opinion of the court, said: "Whether exemplary, vindictive, or punitive damages, —

(*l*) Nightingale *v.* Scannell, 18 Cal. 315.

There is, however, a difficulty, as well as a great difference among the courts, in their practice in relation to verdicts which are alleged to be excessive. In those cases in which compensative damages may be ascertained within narrow limits, by computation, it is easy to say when these limits are certainly

that is, damages beyond a compensation, or satisfaction for the plaintiff's injury, — can ever be legally awarded, as an example to deter others from committing a similar injury, as a punishment of the defendant for his malignity or wanton violation of social duty, in committing the injury which is the subject of the suit, is a question upon which we are not now required or disposed to express an opinion. The argument and the authorities on both sides of this question are to be found in 2 Greenleaf on Ev. tit. Damages, and Sedgwick on Damages, 39, *et seq.* If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel, and assault and battery. If they could be, the defendant might be punished twice for the same act. We decide the present case on this single ground. See Thorley *v.* Kerry, 4 Taunt. 355; Whitney *v.* Hitchcock, 4 Denio, 461; Taylor *v.* Carpenter, 2 Woodb. & M. 1, 22." But in Cook *v.* Ellis, 6 Hill, 466, Jefferson *v.* Adams, 4 Harring 321, vindictive damages were allowed, although the defendants had been indicted and fined for the same injury. See Jacks *v.* Bell, 3 C. & P. 316. In Whitney *v.* Hitchcock, 4 Denio, 461, it was held, that in trespass for assault and battery upon the child or servant of the plaintiff, the measure of damages is the actual loss which the plaintiff has sustained; and exemplary damages cannot be given, though the assault be of an indecent character, upon a female, and under circumstances of great aggravation. The court said: "The present suit is brought for the loss of the services of his servant, which the plaintiff says he has sustained in consequence of the injury which the defendant has inflicted upon her. This he is entitled to recover; and if sickness had followed, he could have claimed to be reimbursed for the expenses attending such sickness; but we all think that he cannot recover beyond his actual loss. The young female can herself maintain an action, in which her damages may be assessed according to the rule laid down at the trial; and if the father could likewise recover them in this case, they could be twice claimed in civil actions, and the defendant would also be liable to indictment. The action for seduction is peculiar, and would seem to form an exception to the rule, that actual damages only can be recovered, where the action is for loss of service consequential upon a direct injury; but there the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded upon special reasons only applicable to that case." In Rippey *v.* Miller, 11 Ired. 247, it was held, under a statute enacting that all actions of trespass and trespass on the case shall survive, when they are not merely vindictive, that in an action against the representatives of one deceased, who had committed a trespass upon the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages. In Amer *v.* Longstreth, 10 Penn. St. 145, it was held, in an amicable action of trespass instituted to try the rights of the parties, that the damages must be measured by the actual injury, although there might have been a wanton invasion of the plaintiff's rights. In Singleton *v.* Kennedy, 9 B. Mon. 222, it was held, that in an action on the case for fraud, in the sale of personal property, the jury were not authorized to assess vindictive damages. But see Spikes *v.* English, 4 Strobh. 34. In Barnard *v.* Poor, 21 Pick. 378, it was held, in an action on the case against the defendant, for carelessly and negligently setting fire on his own land, whereby the plaintiff's property on adjoining land was destroyed, that it was not material whether the proof established *gross negligence* or only want of ordinary care, for in either case the plaintiffs would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages or otherwise. But in Whipple *v.* Walpole, 10 N. H. 130, it was held, that in cases of gross negligence exemplary damages might be recovered.

exceeded. And generally, in these cases, and in actions upon contract or on tort, when no actual bad motive is relied upon, it is for the court to direct the jury in what way, or by what rule or measure they should assess the damages. Vindictive or punitory damages can not be allowed on a mere breach of contract. Nor for a trespass not malicious in its character. (*m*) But there are cases which seem to justify the remark sometimes made in them by the courts, that there is no rule by which the damages can be measured, and they must be left to the discretion of the jury. (*n*) And in such cases a verdict would not be disturbed for excess, unless it indicated wilful perversity, or blinding prejudice or passion, or an entire misapprehension of the merits of the case and the duty of the jury. (*o*)

(*m*) Gordon *v.* Brewster, 7 Wis. 355; Selden *v.* Cushman, 20 Cal. 56.

(*n*) In Berry *v.* Vreeland, 1 N. J. 183, *Green*, C. J., in delivering the opinion of the court in an action of trespass *quare clausum fregit*, said: "The court, in actions of trespass, especially for personal torts, when damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages, with reluctance, and never except in a clear case. But when the plaintiff complains of no injury to his person or his feelings; where no malice is shown, where no right is involved beyond a mere question of property; where there is a clear standard for a measure of damages, and no difficulty in applying it; the measure of damages is a question of law, and is necessarily under the control of the court." See also, Leland *v.* Stone, 10 Mass. 462, per *Jackson*, J.; Farrand *v.* Bouchell, Harper, 87; Alder *v.* Keighley, 15 M. & W. 117; Walker *v.* Smith, 1 Wash. C. C. 152; Wylie *v.* Smitherman, 8 Ired. 236; Commonwealth *v.* Sessions of Norfolk, 5 Mass. 437, per *Parsons*, C. J.

(*o*) Huckle *v.* Money, 2 Wilson, 205; Sharp *v.* Brice, 2 W. Bl. 942; Williams *v.* Currie, 1 C. B. 841; Cook *v.* Hill, 3 Sandf 331; Woodruff *v.* Richardson, 20 Conn. 238. In Huckle *v.* Money, 2 Wilson, 206, *Pratt*, C. J., said: "The law has not laid down what shall be the measure of damages in actions of *tort*; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; *torts* or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, etc., the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by the jury in giving damages; the few cases to be found in the books of new trials for torts, show that courts of justice have most commonly set their faces against them. . . . . It is very dangerous for the judges to intermeddle in damages for *torts;* it must be a glaring case indeed of outrageous damages in a *tort*, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." The same rule is acted upon by the courts in actions for breach of promise to marry. Clark *v.* Pendleton, 20 Conn. 495; Perkins *v.* Hersey, 1 R. I. 495. But in all these cases, new trials are granted if the damages are clearly excessive. Chambers *v.* Robinson, 2 Stra. 691; Price *v.* Severn, 7 Bing. 316; Boyd *v.* Brown, 17 Pick. 453; McConnell *v.* Hampton, 12 Johns. 234; Wiggins *v.* Coffin, 3 Story, 1; Collins *v.* The A. & S. R. R. Co. 12 Barb. 492; Diblin *v.* Murphy, 3 Sandf 19. In Sharp *v.* Brice, 2 W. Bl. 942, *De Grey*, C. J., said: "It has never been laid down that the court will not grant a new trial for excessive damages in any case of *tort*. It was held so long ago as in Comb. 357, that the jury have not a despotic power in such actions. The utmost that can be said is, and very truly, that the same rule

From all injuries the law implies that damages are sustained. If the injury be nothing more than the invasion of a legal right, the law, usually at least, implies nothing more than nominal damages, for these suffice to determine the question of right, and more will not be given unless actual injury be shown. But the actual injuries need not always be set forth in the declaration. If the injury be one from which actual loss, suffering, or mischief must *necessarily* ensue, this the law will generally infer, and it need not be specifically alleged. But that which occurs directly yet not necessarily and as a certain or inevitable consequence, should, as a general rule, be specifically stated, and then, being proved, damages may be founded upon it. (*p*) Thus, if one who owes money refuses to pay it, the creditor may sue and declare himself damaged, without specifying in what way, because the law understands, that when one cannot get money which is due to him, he must sustain loss. So, if in slander, the words charge an indictable offence, or a contagious disease, or impute insolvency to a merchant, or make any other imputation which, if believed, must tend to exclude a man from society, subject him to punishment as a criminal, or interfere with his lawful occupation, the plaintiff need not here say in what way he is damaged, for the law asserts that such slander as this must be injurious. (*q*) But if

does not prevail upon questions of *tort*, as of contract. In contract the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in *torts* a greater latitude is allowed to the jury, and the damages must be excessive and outrageous to require or warrant a new trial." In Letton *v.* Young, 2 Met. (Ky.), 558, the court say, that "it has been repeatedly held by this court that a new trial should not be granted because of excessive damages, and especially in actions of this character (slander), unless the damages should be so great as to strike the mind at first blush as having been superinduced by passion or prejudice."

(*p*) 1 Chitty's Pl. 332; Stevens *v.* Lyford, 7 N. H. 360; Furlong *v.* Polleys, 30 Me. 491; Bedell *v.* Powell, 13 Barb. 183. In Vanderslice *v.* Newton, 4 Comst. 130, the action was for a breach of a contract to tow the plaintiff's boat. *Ruggles*, J., in delivering the opinion of the court, said: "With respect to the damages, the general rule in questions of this nature is, that the plaintiff is entitled to recover, as a recompense for his injury, all the damages which are the natural and proximate consequence of the act complained of. (2 Greenl. Ev. § 256.) Those which *necessarily* result from the injury are termed general damages, and may be shown under the general allegation of damages, at the end of the declaration. But such damages as are the natural, although not the necessary result of the injury, are termed special damages, and must be stated in the declaration, to prevent a surprise upon the defendant; and being so stated may be recovered."

(*q*) Bacon's Abr. tit. Slander, (B), 1 Stark on Slander, 10. See Whittemore *v.* Cutter, 1 Gallis. 429, per *Story*, J.; Swan *v.* Tappan, 5 Cush. 104.

the words charged are of other matters, and the defamation may or may not have been injurious, the plaintiff must now set forth specifically the damages he has sustained, and either prove them as alleged, specifically, or prove facts from which the jury may infer them. (r) These damages are called special damages. They are such consequences of the injury as are both actual and natural, but not necessary.

SECTION V.

OF DIRECT, OR REMOTE, CONSEQUENCES.

Damages will not, in general, be given for the consequences of wrong doing, which are not the natural consequences, because it is only for them that the defendant is held liable. Thus, if he has beaten the plaintiff, he must compensate for all the evils which naturally flow from the beating, whatever they may be; but if a slight bruise has been so ill-treated by a surgeon, that extensive inflammation and gangrene have supervened and a limb is lost, the defendant is not answerable for this. Nor, on the same principle, ought he to be held responsible if the same consequences follow from a slight bruise, by reason of the peculiarly unhealthy condition of the plaintiff, if the defendant had no means of knowing this. Still, it is sometimes difficult to draw the line between what are and what are not the natural consequences of an injury. Always, however, if the consequences of the act complained of have been in-

(r) Bacon's Abr. tit. Slander, (C). In Beach *v.* Ranney, 2 Hill, 309, it was *held*, that such damages must be *pecuniary*, and that proof of mere mental or bodily suffering, loss of society, or of the good opinion of neighbors, would not be sufficient. But it has been held, that a refusal to receive the plaintiff as a visitor, on account of the slander, was sufficient evidence to support an allegation of special damage. Moore *v.* Meagher, 1 Taunt. 39; Williams *v.* Hill, 19 Wend. 305. So, where the plaintiff was refused civil treatment at a public-house; Olmsted *v.* Miller, 1 Wend. 506. In Bradt *v.* Towsley, 13 Wend. 253, the plaintiff having been called a prostitute, brought her action of slander, alleging a special damage, loss of health, and a consequent derangement of business; the defendant demurred, and there was judgment on the demurrer for the plaintiff. See also, Hartley *v.* Herring, 8 T. R. 130.

creased and exaggerated by the act, or the omission to act, of the plaintiff, this addition must be carefully discriminated from those natural consequences of the act of the defendant, for which alone he is responsible. If the plaintiff chooses to make his loss greater than it need have been, he cannot thereby make his claim on the defendant any greater. (*s*)

It is an ancient and universal rule, resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate, and not for the remote consequences of his actions. One does not pay money which is due; the creditor, in his reliance on this payment, has made no other arrangements; he is therefore unable to meet an engagement of his own; his credit suffers, his insolvency ensues, and he is ruined. All this is distinctly traceable to the non-payment of his debt by the defendant; yet he shall be held liable only for its amount and interest; *causa proxima, non remota, spectatur;* and the proximate cause of the plaintiff's insolvency was his non-payment of the debt he himself owed. The cause of this cause was the defendant's failure to pay his debt. But this was a remote cause, being thrown back by the interposition of the

(*s*) Miller *v.* Mariner's Church, 7 Greenl. 51; Walker *v.* Ellis, 1 Sneed, 515; Davis *v.* Fish, 1 Greene (Iowa), 406; Dorwin *v.* Potter, 5 Denio, 306. In Loker *v.* Damon, 17 Pick. 284, the action was trespass for removing a few rods of fence, and it was *held,* that the proper measure of damages was the cost of repairing it, and not the injury to the crop of the subsequent year, arising from the defect in the fence, it appearing that such defect was known to the plaintiff. *Shaw,* C. J., said: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully, and obstinately; or, through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote." But see Heaney *v.* Heeney, 2 Denio, 625; Green *v.* Mann, 11 Ill. 613. So in actions for personal injuries, evidence is admissible in mitigation of damages, to show that the plaintiff provoked the injury, or otherwise brought it upon himself. Fraser *v.* Berkely, 7 C. & P. 621; Watts *v.* Fraser, 7 id. 369; Calcraft *v.* Harborough, 4 C. & P. 499. But the provocation must have been so recent as to induce a presumption that the injury was inflicted under the influence of it. Lee *v.* Woolsey, 19 Johns. 319. In Evansville, &c. R. R. Co. *v.* Lowdermilk, 15 Ind. 120, it was held, that where a person's own negligence contributed to his death, the company was not liable, although guilty of negligence, unless so gross, as to imply a willingness to inflict the injury.

proximate cause. (*t*) In such a case as this the reason of the rule is plain enough. If every one were answerable for all the consequences of all his acts, no one could tell what were his liabilities at any moment. The utmost caution would not prevent one who sustained any social relations from endangering all his property every day. And as very few causes continue to operate long without being combined and complicated with others, it would soon become impossible to say which of the many persons who may have contributed to a distant result should be held responsible for it, or in what proportions all should be held.

We must then stop somewhere; but the question where we shall stop is sometimes one of great uncertainty. Not only is there no definite rule, or clear and precise principle given by which we may measure the nearness or remoteness of effect in this respect; but the highest judicial authorities are so directly antagonistic, that they scarcely serve as guides to lead us to a conclusion. For example, the Court of King's Bench, and the Supreme Court of the United States, decide this question as it is presented to them in circumstances of almost exact similarity, in precisely opposite ways. (*u*) We have been disposed to think that there is a principle, derivable on the one hand from the general reason and justice of the question, and on the other hand applicable as a test, in many cases, and perhaps useful, if not decisive, in all. It is that every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore unde-

(*t*) Archer *v.* Williams, 2 Car. & K. 26.

(*u*) An insured vessel, having sunk another vessel, by accidental collision, was sentenced by a foreign Admiralty Court (acting on a peculiar local law), to pay one half the value of the lost vessel. It was held in Peters *v.* The Warren Ins. Co. 3 Sumner, 389, 14 Peters, 99, that a peril of the sea was the proximate cause of the loss of the sum thus paid, and that the insurers were liable for it. The very same point arose about the same time in the Court of King's Bench, and received a directly opposite adjudication. De Vaux *v.* Salvador, 4 A. & E. 420. And on this question we cannot but prefer the reasons and conclusions of the English court. The maxim, *causa proxima, non remota, spectatur*, may be applied with more strictness to contracts of insurance, than in questions respecting damages, but the difficulty and uncertainty in its application are equally great in both cases. The authority of Peters *v.* Warren Ins. Co. is much lessened by the later cases of Gen. M. Ins. Co. *v.* Sherwood, 14 How. 352, and Matthews *v.* Howard Ins. Co. 1 Kern. 9. See 2 Parsons on Maritime Law, 225–230.

no moral obligation to take into his consideration. (*v*) There seems little reason to object to this rule in cases where the act complained of was voluntary and intentional. And if it be said that where the act is wholly involuntary, as where the defendant's ship runs down another at anchor, in a dark night, there is no reason for asking what consequences he should have expected, when he had not indeed the least thought of doing the thing itself, it may be answered, that even here it will generally be found, that the consequences which at the time would have been foreseen, by a person of intelligence and deliberate observation, are just those which are so far the direct, immediate, and natural effects of the act, that the doer of the act ought, on the general principles of common justice, to be held responsible for them. Another principle distinctly applicable to the question whether cause of "damage" was proximate or remote, is this: did the cause alleged produce its effect *without* another cause intervening, or was it made operative only through and by means of this intervening cause? We apprehend that this principle is involved in the later maxim above quoted. *Remoter* means only "removed," whereas our English word "remote" has now acquired the sense of "distant." But it is difficult, and perhaps impossible, to lay down definite rules, which shall have, in all cases, practical value or efficacy in determining for what consequences of an injury a wrongdoer is to be held responsible. (*w*)

(*v*) Greenland *v.* Chaplin, 5 Exch. 243. In Rigby *v.* Hewitt, 5 Exch. 240, an action on the case was brought for an injury to the plaintiff, from the negligent driving of the defendant's omnibus. *Pollock*, C. B., in giving the opinion of the court, said: "I am disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct." This rule appears where contracts are broken, without fraud or malice. Pothier on Obligations (by Evans), Part 1, c. 2, art. 111, p. 90. See Williams *v.* Barton, 13 La. 410.

(*w*) In Harrison *v.* Berkley, 1 Strobh. 548, *Wardlaw*, J., said: "Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence, which shall do no direct harm, but set in motion some second agent that shall move a third, and so on until the most disastrous consequences shall ensue. The first wrongdoer, unfortunate rather than seriously blamable, cannot be made answerable for

Both in England and America, it is generally held, that profits are not to be included in the injury for which compen-

all these consequences. He shall not answer for those which the party grieved has contributed by his own blamable negligence or wrong to produce, or, for any which such party, by proper diligence, might have prevented. (Com. Dig. Action on the Case, 141, B. 4; 11 East, 60; 2 Taunt. 314; 7 Pick. 282.) But this is a very insufficient restriction; outside of it would often be found a long chain of consequence upon consequence. Only the proximate consequences shall be answered for. (2 Greenleaf's Ev. § 210, and cases there cited.) The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be, would often depend upon the power of the microscope with which we should regard the affair." The general character of the adjudications upon the subject may be gathered from the following cases. In Ashley *v.* Harrison, 1 Esp. 48, Peake, 194, a performer employed by the plaintiff was libelled by the defendant, and in consequence refused to appear upon the stage. It was alleged as special damage that the oratorios had been more thinly attended on that account. It was held, that the injury was too remote, and, per Lord *Kenyon*: "If this action is to be maintained I know not to what extent the rule may be carried. For aught I can see to the contrary, it may equally be supported against every man who circulates the glass too freely, and intoxicates an actor, by which he is rendered incapable of performing his part on the stage. If any injury has happened, it was occasioned entirely by the vain fears or caprice of the actress." See also, Moore *v.* Adam, 2 Chitty, 198; Boyle *v.* Brandon, 13 M. & W. 738; Lincoln *v.* The S. & S. R. R. Co. 23 Wend. 425; Donnell *v.* Jones, 13 Ala. 490; Morrison *v.* Davis, 20 Penn. St. 171; Denny *v.* New York Central R. R. Co. 13 Gray, 481. It was *held*, that an action for slanderous words not in themselves actionable, could not be maintained on the ground that injury resulted from the repetition of these words by a third person. Ward *v.* Weeks, 7 Bing. 211; Stevens *v.* Hartwell, 11 Met. 542. In Vicars *v.* Wilcocks, 8 East, 1, the defendant asserted that his cordage had been cut by the plaintiff, in consequence of which the latter, who was hired for a time certain, was discharged from employment by his master. It has been *held*, that the defendant was not liable for damages caused by the discharge, and, per Lord *Ellenborough*: "The special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if, in consequence of the words spoken, other persons had afterwards assembled, and seized the plaintiff and thrown him into a horse-pond, by way of punishment for his supposed transgression. And his Lordship asked, whether any case can be mentioned of an action of this sort, sustained by the tortious act of a third person." See also, Morris *v.* Langdale, 2 B. & P. 284, 289; Crain *v.* Petrie, 6 Hill, 522; Kendall *v.* Stone, 1 Seld. 14. But the decision in Vicars *v.* Wilcocks has been questioned in 1 Stark. Slander, 205–207; Green *v.* Button, 2 Cromp., M. & R. 707; Coppin *v.* Braithwaite, 8 Jur. 875, per *Parke*, B.; and in Keene *v.* Dilke, 4 Exch. 388, it was *held*, that, "if a sheriff wrongfully seizes goods which are afterwards taken from him by another wrongdoer, the owner of the goods may, in an action against the sheriff, recover as special damage the amount necessarily paid to the other wrongdoer, in order to get back the goods." But *Alderson*, B., distinguished the case from Vicars *v.* Wilcocks, by remarking, that "in Vicars *v.* Wilcocks there was no cause of action without special damage. Here it is only a question as to the amount of damages." See also, Moody *v.* Baker, 5 Cowen, 351. In actions for a breach of warranty this question has arisen. In Borradaile *v.* Brunton, 8 Taunt. 535, 2 J. B. Moore, 582, the defendant sold the plaintiff a chain cable, warranted to last two years, as a substitute for a rope cable of sixteen inches. Within two years the cable broke and was lost, together with the anchor attached to it. It was *held*, in an action for breach of the warranty, that the value of both the cable and anchor could be recovered. In Hargous *v.* Ablon, 5 Hill, 472, the defendant sold cloth, warranting the invoice to be correct; it

sation is to be made. Yet those would seem to be precisely those consequences which the owner of merchandise did expect, and the loss of them would be that which one who interfered with the owner, as by unlawful capture, must have contemplated as certain. But the answer is, that profits are excluded, not because they are in themselves remote, but because

proved to be much overstated, and in consequence, the duties on the cloth, when exported to a foreign market, were overpaid. It was *held*, in an action for breach of the warranty, that the excess of duties could not be recovered as damages. *Cowen*, J., said: "The only question before us, therefore, relates to the amount of damages recoverable. The general rule would stop with awarding to the plaintiff so much only as would make good the difference between the price paid and the value which the article fell short in consequence of the warranty being broken. A warranty or promise concerning a thing being general, that is to say, not having reference to any purpose for which it is to be used out of the ordinary course, the law does not go beyond the general market in search for an indemnity against its breach. (See Blanchard *v.* Ely, 21 Wend. 342, 347, 348; Voorhees *v.* Earl, 2 Hill, 288, 292, a.) The exceptions will all be found to lie in the special nature of the promise or warranty itself, express or implied. Thus, in the case of Borradaile *v.* Brunton (2 J. B. Moore, 582), mentioned at the bar, and mainly relied on for the plaintiff, the warranty was, that a cable should last two years. It failed before, in consequence of which the anchor was lost. The plaintiff was allowed to recover, not only for the cable, but the anchor; the court saying the loss of the last was consequential to the insufficiency of the cable. Where goods are purchased for a particular market, and that known to both parties, the damages have been governed by the price of that market. (Bridge *v.* Wain, 1 Stark. 504.) But where the warranty is general, an accidental damage, even in the vendee's own affairs, is not regarded." See also, Langridge *v.* Levy, 2 M. & W. 519, 4 id. 337. In an action by a lessee against his lessor, for refusing to allow the lessee to enter upon the demised premises, the plaintiff is entitled to recover the damage sustained by him in his removal to the premises. Driggs *v.* Dwight, 17 Wend. 71; Giles *v.* O'Toole, 4 Barb. 261; Johnson *v.* Arnold, 2 Cush. 46; Lawrence *v.* Wardwell, 6 Barb. 423. Although the injury may have been inflicted by the immediate agency of a third person, the wrongdoer will be liable if his wrongful act naturally led to the injury; as where the defendant descended in a balloon into the plaintiff's garden, and drew to his assistance a crowd, who trod down the vegetables and flowers, the defendant was held liable for these injuries. Guille *v.* Swan, 19 Johns. 381; Scott *v.* Shepherd, 2 W. Bl. 892; Vanderburgh *v.* Truax, 4 Denio, 464; so also, if caused by the act of a horse; Gilbertson *v.* Richardson, 5 C. B. 502. See also, Lynch *v* Nirden, 1 Q. B. 29. A lapse of time may intervene between the wrongful act and the injury; Dickinson *v.* Boyle, 17 Pick. 78. In Tarleton *v.* M'Gawley, Peake, 205, the defendant was held liable for firing cannon at the natives on the coast of Africa, to prevent their trading with the plaintiff. Firing near the plaintiff's decoy pond, to frighten away the wild fowl, was held actionable in Keeble *v.* Hickeringill, 11 East, 574, *note*. In Watson *v.* A. N. & B. Railway, 15 Jur. 448, 3 Eng. L. & Eq. 497, the plaintiff sent a plan and model to a committee who had offered a prize for the best one of the kind. By the negligence of the common carrier it did not arrive in season to be presented. It was held, that the chance of obtaining the prize could not be considered in assessing the damages. Where the plaintiff's horses escaped into the defendant's field, in consequence of a defect in his fence, and were there killed by the falling of a haystack, which it was alleged was kept in an improper and dangerous manner, the defendant was held liable for the loss of the horses. Powell *v.* Salisbury, 2 Young & J. 391. The expense of searching for property wrongfully taken has been held recoverable as special damage, in an action on the case for the taking of the property. Bennett *v.* Lockwood, 20 Wend 223.

they depend wholly upon contingencies, which are so many, so various, and so uncertain; as the arrival of goods, the time, place, and condition of arrival, the state of the market at that moment, and the like, that it would be impossible to arrive at any definite determination of the actual loss, by any trustworthy method. And the future profits of a business which has been interrupted by the defendant, are open also to the objection of remoteness as well as uncertainty. (x) But where

(x) The probable profits of a voyage have not been allowed as damages, when it has been broken up by the illegal capture of the vessel. The schooner Lively, 1 Gallis. 315; The Amiable Nancy, 3 Wheat. 546, 560; La Amistad de Rues, 5 Wheat. 385; or by a collision occasioned by the fault of the defendant; Fitch *v.* Livingston, 4 Sandf. 492, 514; Cummins *v.* Spruance, 4 Harring. 315; Steamboat Co. *v.* Whillden, 4 id. 233; Finch *v.* Brown, 13 Wend. 601; or by legal attachment of the ship; Boyd *v.* Brown, 17 Pick. 453. In Smith *v.* Condry, 1 How. 28, 35, *Taney*, C. J., said: "It has been repeatedly decided, in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party, at the time and place of the injury, that is the measure of damages." But see Wilson *v.* Y. N. & B. R. R. Co., at *nisi prius*, cited 18 Eng. L. & Eq. 557, *note*. And in The Narragansett, 1 Blatchf. C. C. 211 (a case in admiralty), the value of the services of the vessel, while undergoing necessary repairs for injuries received by collision, was allowed as a part of the damages sustained by her owners. See also, Williamson *v.* Barrett, 13 How. 101, and 1 Parsons on Maritime Law, 204. It was *held*, in an action by the builder of a steamboat for its price, that the owner could not recoup the amount of profits which would probably have arisen from trips, which were prevented by defects in the construction of the boat. Blanchard *v.* Ely, 21 Wend. 342. See Taylor *v.* Maguire, 13 Mo. 517; Davis *v.* Tallcot, 2 Kern. 184. In an action against a lessor, for refusing to allow the lessee to enter upon the demised premises, the profits which the lessee might have made in his business, had he occupied the premises, cannot be recovered as damages. Giles *v.* O'Toole, 4 Barb. 261. In an action for the breach of a contract to make and deliver certain machinery within a certain time, the profits which might have accrued from the manufacture of an article with the machinery, had the contract not been broken, cannot be considered in estimating the profits. Freeman *v.* Clute, 3 Barb. 424. So in Hadley *v.* Baxendale, 9 Exch. 341, 26 Eng. L. & Eq. 398. A common carrier contracted with a miller to carry for hire two pieces of iron, forming the broken shaft of a mill, and deliver the same to an artificer, to serve as a model for a new one. A shaft being indispensable to the working of the mill, and the miller not having another, the mill necessarily remained idle until the new shaft could be supplied, but of this the carrier was not aware. He did not, however, deliver the iron to the artificer within a reasonable time, and, a delay having consequently arisen in the delivery of the new shaft, he was sued by the miller for a breach of his agreement. *Held*, that the plaintiff could not recover as damages the loss of profits incurred by the stoppage of the mill; and *Alderson*, B., said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may, fairly and reasonably, be considered arising naturally, that is, according to the usual course of things, from such breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances, under which the contract was actually made, were communicated by the

profits are not liable to either of these objections, there they should be admitted, as giving a right to compensation in damages. This admission seems, however, in general, to be limited to cases in which the profits are the immediate fruit of the contract, and are independent of any collateral engagement or enterprise, entered into in expectation of the performance of the principal contract. (*y*) In some instances, the courts have gone

plaintiff to the defendant, and thus known to both parties, the damages, resulting from the breach of such a contract, which they would reasonably contemplate, would be, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injuries which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have especially provided for the breach of contract, by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." But in Waters *v.* Towers, 8 Exch. 401, 20 Eng. L. & Eq. 410, where the action was for the non-fulfilment of a contract to furnish machinery in a reasonable time, it was held, that the jury might assess damages for loss of profits to be derived from contracts with third parties, if the jury believed that such profits would have been obtained. But the loss of profits was set forth in the declaration. A vendee of property cannot recover against the vendor, in an action for a breach of the contract to sell, damages on account of an advantageous contract of resale, made by the vendee with a third person. Lawrence *v.* Wardwell, 6 Barb. 423. In Wilbert *v.* The New York and Erie Railroad Co. 19 Barb. 36, it was held, that in an action against the defendants for negligence in not conveying a quantity of butter to market within a reasonable time, the plaintiffs cannot recover, as damages, the difference between the price of butter at the time it should have been delivered and its price at the time when the butter in question was in fact delivered. But evidence of the amount of probable profits, has sometimes been admitted, not as a measure of damages, but to aid the jury in estimating the loss. M'Neill *v.* Reid, 9 Bing. 68; Ingram *v.* Lawson, 6 Bing. N. C. 212; Donnell *v.* Jones, 17 Ala. 689.

(*y*) Thus, where a party refuses to fulfil a contract, the other party may recover as damages the difference between the sum he was to be paid for performing it and what it would have cost him to complete it. In Masterton *v.* Mayor of Brooklyn, 7 Hill, 61, the plaintiffs agreed to furnish the marble necessary for a public building at a specified sum. The defendants suspended operations, and the plaintiffs were thereby prevented from furnishing the full amount. An action of covenant was brought. *Nelson*, C. J., said: "When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account in ascertaining the measure of damages, they usually have relation to dependent and collateral engagements, entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and often doubtless does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. . . . . . The contract here is

so far, in effect, as to allow, as damages, the amount of the profits which would probably have arisen from contracts that depended upon the performance of the principal contract. (z) And it is said by the Supreme Court of the United States, that evidence of the value of the business which plaintiff was disqualified to perform, by the act or neglect of the defendant, may be received as a measure of damages. (a)

The general principle as to remoteness, has been applied to cases were sureties were put to extraordinary loss and inconvenience, on account of the obligations of their suretyship; and

for the delivery of marble wrought in a particular manner, so as to be fitted for use in the erection of a certain building. The plaintiff's claim is substantially one for not accepting goods bargained and sold; as much as if the subject-matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule, grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only the mode of ascertaining the actual value of the articles, or rather the cost of the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it, becomes necessary; and that compared with the contract price will afford the measure of damages." See Fox *v.* Harding 7 Cush. 516. The N. Y. & H. R. Co. *v.* Story, 6 Barb. 419; Lawrence *v.* Wardwell, 6 id. 423; Seaton *v.* The Second Municipality, 3 La. An. 44; Goodloe *v.* Rogers, 9 id. 273. The principle laid down in Masterton *v.* Mayor of Brooklyn, was approved in the Supreme Courts of the United States, in P. W. & B. R. R. Co. *v.* Howard, 13 How. 307, 344. *Curtis*, J., in delivering the opinion of the court, said: "Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.* And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he spends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it when the other party has broken the contract, and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value, or cost. See Masterton *v.* Mayor of Brooklyn, 7 Hill, 61, and cases there referred to. We hold it to be a clear rule, that the gain or profit of which the contractor was deprived, by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

(z) In Clifford *v.* Richardson, 18 Vt. 620, the defendant put machinery into the plaintiff's mill in an unskilful manner, whereby he lost the use and profit of the mill for a long space of time, and was put to great expense in repairing the machinery. It was held, that both the loss of the use of the mill, and the expense of repairs, were to be compensated for in damages. See Green *v.* Mann, 11 Ill. 613; White *v.* Moseley, 8 Pick. 356. In Thompson *v.* Shattuck, 2 Met. 615, the defendant had covenanted to keep in repair half of the plaintiff's mill-dam; it was held, that a loss of profits occasioned by a delay in repairing could not be recovered, as the plaintiff might have made the repairs immediately, at the defendant's expense. But see Blanchard *v.* Ely, 21 Wend. 342, *supra*, n. (x).

(a) Nebraska City *v.* Campbell, 2 Black, 590.

it is held, that they can recover only what they have paid, with interest, and necessary expenses. (*b*) As a general rule, a surety for the payment of money cannot sue his principal, until he pays the debt. (*c*) And if there be no express contract between the principal and surety, it would seem that the only remedy for the latter is assumpsit for money paid, in which only the money actually paid, with interest, can be recovered. But the principal may give the surety a distinct promise to pay money or do some specific act, and then the surety may have an action before he pays any thing for his principal. Thus, if one is surety for another, who is bound to pay a third party a certain sum at a certain time, and the principal promises the surety that he will pay that sum at that time, so as to discharge the surety, if he fails to pay it so that the surety becomes liable, the surety may recover from the principal on his promise, before the surety pays the debt; (*d*) and if the principal agree with the surety to pay the debt at a certain time, and fail to pay it at that time, the surety may thereupon recover the whole amount of the debt without showing any actual damage. (*e*) If the promise of the principal to the surety be only to indemnify and save him harmless, it seems, that if the surety sees fit to bring an action on this promise, before paying the debt of the principal, he cannot maintain it, unless he can show that he has given his own notes, or made other arrangements in the way of acknowledging and securing the debt, which are equivalent to its payment. From the current of authority, and from reason,

(*b*) In Hayden *v.* Cabot, 17 Mass. 169, the action was assumpsit, by a surety against his principal, on a written promise of indemnity. *Parker*, C. J., said: "The common construction of such a contract is, that if the surety is obliged to pay the bond, by suit or otherwise, the principal shall repay him the sum he has been obliged to advance, together with all such reasonable expenses as he may have been obliged to incur, and which may be considered as the necessary consequence of the neglect of the principal to discharge his own debt. But extraordinary expenses, which might have been avoided by payment of the money, or remote and unexpected consequences, are never considered as coming within the contract." And see Low *v.* Archer, 2 Kern. 277; Dolph *v.* White, id. 296.

(*c*) Taylor *v.* Mills, Cowp. 525; Powell *v.* Smith, 8 Johns. 249.

(*d*) Cutler *v.* Southern, 1 Wms. Saund. 116, n. (1); Holmes *v.* Rhodes, 1 B. & P. 638; Hodgson *v.* Bell, 7 T. R. 97; Port *v.* Jackson, 17 Johns. 339; Thomas *v.* Allen, 1 Hill, 145; Churchill *v.* Hunt, 3 Denio, 321; Gilbert *v.* Wiman, 1 Comst. 550; Lathrop *v.* Atwood, 21 Conn. 117.

(*e*) Loosemore *v.* Radford, 9 M. & W. 657; Robinson *v.* Robinson, Q. B. 1855, 29 Eng. L. & Eq. 212; *Ex parte* Negus, 7 Wend. 499; Churchill *v.* Hunt, 3 Denio, 321; Lethbridge *v.* Mytton, 2 B. & Ad. 772; Port *v.* Jackson, 17 Johns. 239.

it may be regarded as a general rule, if not a universal one, that where one's obligation, whether express and voluntary, or implied, or created by law, is only indirect and collateral, there is no cause of action, or at least no right to recover actual compensation, unless there has been an actual damage arising from an actual discharge of the obligation. (*f*)

SECTION VI.

OF THE BREACH OF A CONTRACT THAT IS SEVERABLE INTO PARTS.

It may happen that the injury complained of is the breach of a contract that extends over a considerable space of time, and includes many acts; or it is a tort divisible into many parts. The question then arises whether the action should be for the whole breach or the whole tort, and damages be given accordingly. This must depend upon the entirety of the contract or of the tort. If it be a whole, formed of parts which are so far inseparable that if any are taken away there is no completed breach or tort left, all must be included in the demand and in the damages. (*g*) But if they are separable into many distinct

(*f*) Gilbert *v.* Wiman, 1 Comst. 550; Rodman *v.* Hedden, 10 Wend. 498. In Lathrop *v.* Atwood, 21 Conn. 117, 123, *Church* C. J., said: "We think an examination of the cases will show these reasonable doctrines; that, if a condition, covenant, or promise, be only to indemnify and save harmless a party from some consequence, no action can be sustained for the liability or exposure to loss, nor until actual damage, capable of appreciation and estimate, has been sustained by the plaintiff. But if the covenant or promise be, to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of non-performance, the neglect to perform the act, being a breach of contract, will give an immediate right of action."

(*g*) Hambleton *v.* Veere, 2 Saund. 169, note; Masterton *v.* The Mayor of Brooklyn, 7 Hill, 61. In Shaffer *v.* Lee, 8 Barb. 412, after an elaborate review of the cases, it was held, that a bond conditioned to furnish to the obligee and his wife all necessary meat, drink, lodging, washing, clothes, &c., during both and each of their natural lives, was an entire contract, and that a failure by the obligor to provide for the obligee and his wife, according to the substance and spirit of the covenant, amounted to a total breach; and that full and final damages should be recovered, for the future as well as the past. In Royalton *v.* The R. & W. Turnpike Co. 14 Vt. 311, the defendants agreed to keep a bridge in repair for twenty years, on the plaintiff's paying him twenty-five dollars a year. The money was paid and the bridge kept in repair, according to the agreement, for eight years, when the defendant ceased to repair, and the action was then brought. *Redfield*, J., said, that the jury should "assess the entire damages for the remaining twelve years." See our remarks on entirety of contracts, with the notes, vol. 2, pp. 517–520.

breaches or torts, then an action may be brought as if each stood alone, and damages recovered. (*h*) There would seem, however, to be this qualification to this rule. If there are many parts of the contract, and some have been broken, and others not yet; as if money was to be paid on the first of every month for two years, and one year has expired and nothing has been paid, the creditor may bring his action for one or more of all the sums due, and recovering accordingly, may, when the others fall due and are unpaid, sue for them. (*i*) But if at any time he sues for a part only of the sums due, a judgment will be held to be satisfaction of all the sums which could have been included in that action, and were due and payable by the terms of that contract; and therefore no further suit can be maintained on any of them. (*j*) The reason for this rule is the pre-

(*h*) Crain *v.* Beach, 2 Barb. 120; Bristowe *v.* Fairclough, 1 Man. & G. 143; Clark *v.* Jones, 1 Denio, 516; Puckett *v.* Smith, 5 Strobh. 26; *supra*, note (*g*), and cases cited. In Crain *v.* Beach, 2 Barb. 120, the defendants had covenanted to keep a certain gate in repair, and to use common care in shutting it, and in passing and repassing the same; it was *held*, that if the gate should be suffered to be out of repair, or should be allowed to remain open by the defendants, the damages in an action for the breach of their covenant would be determined by the amount of the plaintiff's loss, by means of the breach proved on the trial of the cause, and that the recovery thereof would be no bar to a future action for a renewed breach of the covenant, s. c. in Error, 2 Comst. 86. *Wright*, J., said: "To constitute an effectual bar, the cause of action in the former suit should be identical with that of the present. It is the same cause of action where the same evidence will support both the actions, although they happen to be grounded on different writs. Rice *v.* King, 7 Johns. 20. But the evidence in both actions may be *in part* the same; yet the subject-matter essentially different, and in such case there is no bar. For example, if money be awarded to be paid at different times, assumpsit will lie on the award for each sum as it becomes due. So on an agreement to pay a sum of money by instalments, an action will lie to recover each instalment as it becomes due. In covenant for non-payment of rent, or of an annuity payable at different times, the plaintiff may bring a new action *toties quoties*, as often as the respective sums become due and payable; yet in each of these examples, the evidence to support the different actions is in part the same. In this case, the same covenant was the foundation of both actions; the same evidence, therefore, in part, is alike common to both; but there is this difference; in the former suit the breach was assigned, and the actual damages laid as having accrued prior to the commencement thereof; in the present, damages are sought to be recovered for a breach subsequent to such former action. In the present action the plaintiff could not have recovered for damages that had accrued prior to the first suit, for he is not permitted to split up an entire demand, and bring several suits thereon; but he may show a breach subsequent to the former suit, and recover the actual damages arising from such subsequent breach.

(*i*) Cooke *v.* Whorwood, 2 Saund. 337. In Ashford *v.* Hand, Andrews, 370, an action on the case was brought by an indorsee, upon a note of hand, for paying 5*l.* 5*s.* by instalments; and the last day of payment being not yet come, he counted only for such part as was due. "It was resolved, that though in the case of an entire contract an action cannot be brought until all the days are past, yet where the action sounds in damages (which is the present case), the plaintiff may sue, in order to recover damages for every default made in payment."

(*j*) Bendernagle *v.* Cocks, 19 Wend.

vention of unnecessary and oppressive litigation. And it would doubtless be regarded in actions founded on tort, whenever it was distinctly applicable to them.

The contract may be for a considerable time; and if a breach occurs before the whole time expires, and an action is at once brought, the question arises whether the whole period may be considered by the jury in assessing damages. The principle which must decide this question, we apprehend to be this; if the breach be final and conclusive, then, and then only, can the jury estimate from such evidence as they have, what is the present damage to the plaintiff, by the violation of the whole contract. (*k*) For example, a corporation hires an overseer at so much wages and such a share of the profits for three years. At the end of one, he is dismissed without good cause. We should call this a final breach; and should say, the jury should determine what he loses by the wages and profits for the residue of the three years, deducting what his time and labor may be worth for that time, the facility or difficulty of finding employment, and all other circumstances bearing upon the estimate, being considered.

SECTION VII.

OF THE LEGAL LIMIT TO DAMAGES.

The law would avoid unnecessary litigation, would make it, where necessary, efficacious and conclusive in its action, and would protect each party against the other, by doing exact justice to both. These are its ends; and as its rules are only means for these, they are of secondary value; but as without

207; Colvin *v.* Corwin, 15 Wend. 557; Pinney *v.* Barnes, 17 Conn. 420. In case of a running account, for goods sold or money lent, it has been held, that a suit upon one or more items, would bar a subsequent suit on other items due at the time of the first suit. Guernsey *v.* Carver, 8 Wend. 492; Bendernagle *v.* Cocks, *supra;* Lane *v.* Cook, 3 Day, 255; Avery *v.* Pitch, 4 Conn. 362. The opposite doctrine was held in Badger *v.* Titcomb, 15 Pick. 409. If any of the items were not due at the time of the action, a suit for them would not be thereby barred. McLaughlin *v.* Hill, 6 Vt. 20.

(*k*) This principle is clearly stated and well illustrated in Remelee *v.* Hall, 31 Vt 582.

them there would be no certainty in judicial action, and no accurate knowledge of personal rights and obligations, these rules are adhered to, although in one case or in another they work a hardship, until it is found that their general effect is mischievous. In that case they are set aside, or controlled by those more general rules by which the particular rules may be qualified and varied in their operation, and yet leave judicial action systematic and regular. These general remarks have an especial bearing on the subject of damages. Of the ancient rules some have been abrogated, and others greatly qualified. And in modern times, courts seek to apply to each case such rules, as will carry out the universal rule, as far as may be, that the actual damages must measure the compensation given for it by the law.

1. In an Action against an Attorney or Agent.

Thus, in an action against an attorney for negligence, it was once said, that the jury might find what damages they pleased. (*l*) But the law would not now relinquish its functions in this way; for although quite as strongly disposed as ever, that an agent should compensate his principal, or a servant his employer, for any wrong done, it would endeavor to measure the injury, and by the injury to measure the compensation, as carefully in this case as in any other. In accordance with this principle, it has been decided, that where an agent is directed to sell goods, if he can get a certain price, and not to sell for less, but does in fact sell for less, but without fraudulent purpose, the actual value of the goods sold, or the highest value before the action, or even before the trial, and not the price set upon them, must be considered in estimating the damages. (*m*)

(*l*) Russell *v.* Palmer, 2 Wilson, 328.

(*m*) Blot *v.* Boiceau, 3 Comst. 78, overruling s. c. 1 Sandf. 111; Austill *v.* Crawford, 7 Ala. 335; Ainsworth *v.* Partillo, 13 Ala. 460. In Frothingham *v.* Everton, 12 N. H. 239, the plaintiffs, March 27th, 1837, received of the defendant a consignment of wool, with instructions not to sell it for less than twenty-four cents a pound. The price of wool fell soon after the consignment, and continued to decline until October 5th, 1837, when the plaintiffs, without previous notice to the defendants, sold the wool for fourteen cents per pound, which was then the fair market price, and as high as wool sold at any subsequent time before the suit was brought. An advance was made by the plaintiffs, at the time of the consignment, and this action was brought

If a factor, having made advances on goods consigned to him for sale at a limited price, do afterwards, in good faith, and with reasonable delay and proper precautions, sell them for less than their limited price, but at a fair market price, he may recover the balance of his advances, if the consignor or principal refuse to pay them, on a proper application, and after a sufficient time. (*n*) Still, it may be true, that if the sale were fraudulent on the part of the agent, then it might be said that the agent had, as it were, taken for his own use the goods of his principal, and must pay for them the price which he knows that the principal had set on them.

If the failure of the agent to purchase goods ordered by his principal to be sent on a mercantile adventure, be the ground of the action, it is a question whether the price of the goods when they should have been purchased, or the price at which they

to recover the difference between the amount of that, and the proceeds of the wool. It was *held*, that the plaintiff could recover. *Parker*, C. J., said: "The next question is, to what extent the plaintiffs are accountable to the defendant for this breach of his instructions. If to the amount of the price limited, which would be the result of treating them as purchasers at the price limited, it goes to the whole of the plaintiff's action. But upon what principle are they to be made accountable to that extent? The general principle is, that where one suffers by the negligence or breach of duty of another, the latter is answerable in damages for the amount of the injury. Had these goods been destroyed by the negligence of the plaintiffs, they would have been answerable for the value, and the damages could not have been extended beyond that, merely because the defendant had ordered them to sell at a certain price, and not for less. If, instead of a loss by negligence, the loss be by a disobedience of orders, without fraud, the result must be the same. Had the defendant brought his action against the plaintiffs, for wrongfully selling below the limit, he would have been entitled to recover the damages sustained by the wrongful act. If the goods of the principal are negligently lost or tortiously disposed of, by the agent, he is made liable for the actual value of the goods, at the time of the loss or conversion. Story on Agency, 215. And if, instead of bringing his action to recover this actual value, the consignor set up the breach of duty, in defence of a suit by the factor for moneys advanced upon the goods, the measure of his right must be the same. It cannot be extended beyond the amount of the injury sustained by him. And there can be no sound principle which will enlarge his rights in this respect, merely because he has obtained a general advance on the goods, unless there were an agreement that the factor should look to the goods alone for his reimbursement." In Blot *v.* Boiceau, *supra*, *Bronson*, J., said: "It is said that this rule of damages will enable factors to violate the instructions of their principals with impunity. But that is a mistake. If they sell below the instruction price, though at the then market value, they will take the peril of a rise in the value of the goods at any time before an action is brought for the wrong, and perhaps down to the trial. The owner has a right to keep his goods for a better price; and if the market value advances after the wrongful sale, the increased price will form the standard for ascertaining his loss, which the factor, who has departed from instructions, must make good."

(*n*) Parker *v.* Brancker, 22 Pick. 40; Marfield *v.* Goodhue, 3 Comst. 62. See also, Frothingham *v.* Everton, *supra*.

would have been sold, should be taken in making up damages. We have already seen that the law generally disregards profits, from their remoteness and uncertainty. (*o*) But in this case we think it should be held, that the loss of the principal was not of the goods alone, but of the adventure; and that he should have by way of compensation such profits of the adventure as he can prove with reasonable certainty; that is, the plaintiff should be actually indemnified. (*p*) And on the other hand, as the converse of this rule, the defendant may show what the actual loss is, and reduce the claim of the plaintiff accordingly. (*q*)

If an agent sues his principal, or a servant his employer, the same rule will be applied. He can recover compensation for the injury sustained by the fault of the defendant, and no more. (*r*) If he claims repayment of extra expenses, it is a good defence that they were caused by his own negligence. (*s*)

If he claims commissions, it is a good defence that he has caused to his principal a greater loss than his claim, because this loss, for which he is liable, has more than repaid his claim. (*t*)

(*o*) See pp. 183, 184, and notes.

(*p*) Ryder *v.* Thayer, 3 La. An. 149. In Bell *v.* Cunningham, 3 Pet. 69, 5 Mason, 161, the owners of The Halcyon, at Boston, sent her from Havana to merchants at Leghorn, with directions to invest a part of her freight in marble tiles, and the balance in wrapping paper, to be sent to Havana. The consignees, in violation of these directions, invested the entire freight in wrapping paper, on the sales of which a heavy loss was sustained. The marble tiles would have yielded a considerable profit. The action was brought against the consignees for breach of orders. The court *held*, that the actual value of the tiles at Havana was to be considered in estimating the damages, thus allowing the probable profits of the adventure. *Marshall*, C. J., said: "We do not mean that speculative damages, dependant on possible successive schemes, ought ever to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus, in this case, an estimate of possible profit to be derived from investments at the Havana, of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves, at the Havana, affords a reasonable standard for the estimate of damages." See Masterton *v.* The Mayor, &c. of Brooklyn, 7 Hill, 61.

(*q*) Allen *v.* Suydam, 20 Wend. 321; Hoard *v.* Garner, 3 Sandf. 179; Brown *v.* Arrott, 6 Watts & S. 402, 6 Whart. 9; Van Wart *v.* Woolley, 5 Dow & R. 374. See also, Harvey *v.* Turner, 4 Rawle, 223. In Allen *v* Suydam the agent was negligent in not presenting a bill for acceptance at the proper time. It was held, that the measure of damages was *prima facie* the amount of the bill; but that the defendant was at liberty to show circumstances tending to mitigate damages, or to reduce the recovery to a nominal amount.

(*r*) Stocking *v.* Sage, 1 Conn. 522; Powell *v.* Newburg, 19 Johns. 284; Adamson *v.* Jarvis, 4 Bing. 66.

(*s*) Montriou *v.* Jefferies, 2 C. & P. 113; Howard *v.* Tucker, 1 B. & Ad. 712; Edmiston *v.* Wright, 1 Camp. 88.

(*t*) Dodge *v.* Tileston, 12 Pick. 328;

2. In an Action Against a Common Carrier.

If an action be brought against a common carrier for not carrying or not delivering goods, all the elements which enter into the actual loss must be taken into consideration as in other cases. The general rules adopted seem to be these. If a carrier loses goods or makes a wrong delivery, in such a manner as to render himself liable for them, the net value of the goods at the place of delivery is the measure of damages. (*u*) But if he fails to perform his contract, the goods being still within the power of the owner, the difference between their value at the place where he receives them and their net value at the place of delivery, at the time when they would have arrived, if they had been carried according to the contract, is the measure of damages; (*v*) and it seems that a jury may give interest by way of damages, when a loss arises from the misconduct of the carrier. (*w*)

But from the elements which make up the actual loss, are to be eliminated those causes of loss which spring, not merely from the plaintiff's conduct, but also from his omission to do what he might by reasonable endeavors have done, to lessen the loss.

White *v.* Chapman, 1 Stark. 113; Kelly *v.* Smith, 1 Blatchf. C. C. 290. See also, Bell *v.* Palmer, 6 Cowen, 128; The Allaire Works *v.* Guion, 10 Barb. 55. But damages cannot be recouped, unless they arise in the particular contract on which the action is founded; Deming *v.* Kemp, 4 Sandf. 147.

(*u*) Watkinson *v.* Laughton, 8 Johns. 213; Amory *v.* McGregor, 15 Johns. 24, 38; Brandt *v.* Bowlby, 2 B. & Ad. 932; Arthur *v.* The Schooner Cassius, 2 Story, 81. And see Green *v.* Clarke, 2 Kern. 343. In Wheelright *v.* Beers, 2 Hall, 391, it was held, by a majority of the court, that in such cases the invoice price is to be the measure of damages, unless the carrier be guilty of fraud or fault; but *Oakley*, J., gave a very able dissenting opinion in favor of the rule as laid down above. Where the goods are injured or destroyed, the rule of damages is the value of the goods at the place to which they were to be carried, less the freight. Whether a railroad company, receiving goods directed to a point beyond the terminus of their route, is liable for such damages at the point to which the goods were directed, *quære*. The Mich. &c. R. R. Co. *v.* Caster *et als.* 13 Ind. 164.

(*v*) Brackett *v.* M'Nair, 14 Johns. 170; O'Conner *v.* Forster, 10 Watts, 418. But see Smith *v.* Richardson, 3 Caines, 219. In Adams Express Co. *v.* Egbert, 36 Penn. St. 360, it was held, that the measure of damages for a common carrier's negligence in failing to deliver an architect's plans in season to compete for a premium, was, not the value of the time and labor expended upon the plans by the architect, but the value of his chance of obtaining the premium, and in the absence of proof of any probability that he would have taken the premium, he could only recover nominal damages.

(*w*) Watkinson *v.* Laughton, 8 Johns. 213. In Black *v.* Baxendale, 1 Exch 410, it was held, that the necessary expenses to which the owner is put in consequence of the carrier's delay to fulfil his contract, are recoverable as damages.

For if when a carrier breaks his contract to carry goods, the owner can, by the exercise of ordinary diligence, obtain other means of conveyance, he is bound to obtain and use them, and cannot recover more than the loss occasioned by the extra expense, trouble, and delay. (*x*) So if a party contracts to furnish a certain quantity of cargo, and fails to deliver the entire quantity, the carrier is bound to receive goods from third persons, if offered, sufficient to make up the deficiency, even at a reduced rate of compensation, if offered at the current prices; and place the net earnings of the goods thus substituted to the credit of the person who originally agreed to furnish the whole cargo. (*y*) If the owner of goods has received injury by the negligence of the carrier, the acceptance of the goods is no bar to the action, but may be considered in mitigation of damages. (*z*)

In this action, as well as in some others, the question has arisen, whether the value of the goods to be taken as a measure, is that value which could be realized in open market, without reference to the true worth of the thing. If some wild speculation, or the prevalence of a gross error, has given to certain articles, for a brief time, a value altogether in excess of its natural value, and the fault of the defendant has prevented the plaintiff from obtaining this price by selling at the highest point of the market, can the defendant show, in mitigation of damages, the utter unreasonableness of such a price and its brief duration? The answer, both of reason and of authority, seems to be, that the plaintiff cannot avail himself of any acts on his part of a fraudulent character, while he is entitled to compensation for his actual loss of any price he might have honestly obtained. (*a*)

(*x*) O'Conner *v.* Forster, 10 Watts, 418.

(*y*) Heckscher *v.* McCrea, 24 Wend. 304. See also, Shannon *v.* Comstock, 21 Wend. 457; Costigan *v.* M. & H. R. R. Co. 2 Denio, 609; Walworth *v.* Pool, 4 Eng. 394; Robinson *v.* Noble, 8 Pet. 181.

(*z*) Bowman *v.* Teall, 23 Wend. 306. In Cranwell *v.* Ship Fanny Fosdick, 15 La. An. 436, which was an action for damages by an owner of flour injured by being stowed on ship-board with coal oil, the odor of the oil having affected the flour, the court held, that the force of a custom could not be recognized in opposition to positive law.

(*a*) Smith *v.* Griffith, 3 Hill, 333. This was an action against common carriers, for injury to a quantity of mulberry trees, in consequence of delaying to transport them. After the plaintiff had given evidence of their market value at the time the injury occurred, the defendant offered to prove that at that time the market value was factitious; that, from subsequent experiments, this kind of trees had been as-

3. In the Action of Trover.

In the action of trover, to which a plaintiff generally resorts for remedy when his personal property has been appropriated by another, the value of the property is, in general, the measure of the damages. (*b*) It is true that this is sometimes no adequate compensation for the injury he has sustained; but then he should have sued in trespass, in which action he might have recovered also compensation for the additional damage he has sustained, if it were the direct and natural consequence of the injury. He must be limited by the action he brings; for if he waives the tort altogether, and brings assumpsit for money had and received, he can recover only the amount which the defendant has actually received by the sale of the property, although this may be much less than its value. (*c*) If an owner bring trover after he has regained the possession of his property, or otherwise had the equivalent benefit of it, he can only recover damages to the extent of the injury he has sustained; as, for

certained to be of no intrinsic value; that they were not worth cultivating for the purpose of raising silk-worms; and that, if as much had been known of them, when the injury occurred, as at the time of the trial, they could have been bought at a very low price. This evidence was held inadmissible, *Cowen*, J., dissenting. *Nelson*, C. J., said: "Assuming that there is no defect in the quality of the article, the fair test of its value, and consequently of the loss to the owner, if it has been destroyed, is the price at the time in the market. This makes him whole, because the fund recovered enables him to go into the market and supply himself again with the goods of which he has been deprived. The objection to the evidence offered, is, that it proposed to take into consideration the fluctuations of the market value long subsequent to the time when the injury happened; thereby making the measure of damages depend upon the accidental fall of prices at some future period, which might or might not occur; and if it did, the loss might or might not have fallen upon the plaintiff, as, for aught the court or jury could know, he may have parted with the property before depreciation. . . . I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, to control the market for their own private ends, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation or depression of prices should control the question. These are often accidental, produced by interested and illegitimate combinations, for temporary, special, and selfish objects, independent of the influences of lawful commerce, — a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice."

(*b*) Mercer *v.* Jones, 3 Camp. 477; Kennedy *v.* Strong, 14 Johns. 128; Kennedy *v.* Whitwell, 4 Pick. 466; Sargent *v.* Franklin Ins. Co. 8 Pick. 80; Parks *v.* Boston, 15 Pick. 198, 207, per *Shaw*, C. J.

(*c*) 3 Am. Jur. 288, 289; Bac. Abr. Trover, A.; Lindon *v.* Hooper, Cowp. 419, per Lord *Mansfield;* Hunter *v.* Prinsep, 10 East, 278, 391, per Lord *Ellenborough*

example, for the injury to the chattel, and the value of its use. (*d*) If the defendant has a lien on the property for a certain amount, that amount may be deducted by the jury from the value, in assessing the damages. (*e*)

In trover for a bill or note, or other chose in action, the measure of damages is, *prima facie*, the value on its face. (*f*) But the insolvency of the parties liable thereon, payment, in whole or in part, or any other facts tending directly to reduce its value, may be shown in mitigation of damages. (*g*) And it has been decided that if one, in good faith, purchase and subsequently sell stolen goods, he is liable in trover to the owner, without a demand and refusal. (*h*)

Whether, in this or any action, instead of the actual value, that which the plaintiff puts upon the property, as a gift, perhaps of a dear friend, or for other purely personal reasons, can be recovered, is not perhaps certain. We think it quite clear, however, that this *pretium affectionis* cannot be recovered, unless in cases where the conversion or appropriation by the defendant was actually tortious; and in that case we should be disposed to hold, that the defendant should be made to pay what he would have been obliged to give if he had bought the article; or, at least, that the damages might be considerably enlarged in such a case, on the principle of exemplary damages. (*i*)

The value of the property being the measure of damages in trover, as this value may be different at different times and in

(*d*) Greenfield Bank *v.* Leavitt, 17 Pick. 1; Curtis *v.* Ward, 20 Conn. 204; Ewing *v.* Blount, 20 Ala. 694; Sparks *v.* Purdy, 11 Mo. 219; Hunt *v.* Haskell, 24 Me. 339; Angier *v.* Taunton Paper Man. Co. 1 Gray, 621.

(*e*) Green *v.* Farmer, 4 Burr. 2214, 2223; Chamberlin *v.* Shaw, 18 Pick. 283; Fowler *v.* Gilman, 13 Met. 267.

(*f*) Mercer *v.* Jones, 3 Camp. 477.

(*g*) Ingalls *v.* Lord, 1 Cowen, 240; Romig *v.* Romig, 2 Rawle, 241.

(*h*) Courtis *v.* Cane, 32 Vt. 232.

(*i*) Lord Kaimes's Principles of Equity, b. 1, part 1, ch. 4, § 5, p. 159; Sedgwick on Damages, p. 474; Suydam *v.* Jenkins, 3 Sandf. 621, per *Duer*, J.: "In most cases, the market value of the property is the best criterion of its value to the owner, but in some its value to the owner may greatly exceed the sum that any purchaser would be willing to pay. The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the '*pretium affectionis*,' instead of the market price, ought then to be considered by the jury or court, in estimating the value." In Mississippi, in the case of a slave, the owner is permitted to seek equitable relief, and to claim a specific return of the property, where at common law he would have been limited to an action for damages. Butler *v.* Hicks, 11 Smedes & M. 78; Hull *v.* Clark, 14 Smedes & M. 187.

different places, the question occurs, which of these values is to be this measure. If goods are taken from the owner, and some months afterwards an action is brought, the owner may have lost the opportunity of selling them at the highest price they have reached in the interval. Is he limited to their value when converted; or, if they have a higher value when he brings his action or tries it, may he have that value; or, if they have been higher, and are now lower, may he have the highest price that he could at any time have received for the property, had it remained in his possession? Similar questions arise sometimes in actions for breach of contract to sell for a price payable in specific articles, in replevin, and in some other cases. The answer to these questions, to be deduced from the general current of authority, is, that the value of the property at the time of the conversion, with interest thereon, measures the damages. (*j*) But it is

(*j*) Kennedy *v.* Strong, 14 Johns. 128; Hepburn *v.* Sewell, 5 Harris & J. 211; Kennedy *v.* Whitwell, 4 Pick. 466; Pierce *v.* Benjamin, 14 Pick. 356, 361; Parks *v.* Boston, 15 Pick. 198; Johnson *v.* Sumner, 1 Met. 172; Clark *v.* Whitaker, 19 Conn. 319; Smethurst *v.* Woolston, 5 Watts & S. 106; Watt *v.* Potter, 2 Mason, 77; Lillard *v.* Whitaker, 3 Bibb, 92; Sproule *v* Ford, 3 Litt. 25. In the case of Suydam *v.* Jenkins, 3 Sandf. 614, this subject was discussed with great ability, in a very elaborate opinion, delivered by *Duer*, J. The cases of West *v.* Wentworth, 3 Cowen, 82, and of Clark *v.* Pinney, 7 Cowen, 681, in which it was *held*, that the measure of damages in cases where property has been withheld, is the highest market price betwen the time of the wrongful withholding and the time of the trial, were questioned, and the general measure of damages was held to be the value of the property at the time the right of action accrued, with interest thereon. But if it can be shown that the addition of interest fails to compensate the owner for his actual loss, or to prevent the wrongdoer from realizing a profit, it was held, that a further compensation should be made. *Duer*, J., said: "It may be shown, that had the owner retained possession, he would have derived a larger profit from the use of the property than the interest upon its value; or that he had contracted to sell it to a solvent purchaser at an advance upon the market price; or that when wrongfully taken or converted, it was in the course of transportation to a profitable market, where it would certainly have arrived; and in each of these cases the difference between the market value when the right of action accrued, and the advance which the owner, had he retained the possession, would have realized, ought plainly to be allowed as compensatory damages, and as such to be included in the amount for which judgment is rendered. So where it appears that the owner in all probability would have retained the possession of the property until the time of trial or judgment, and that it is then of greater value than when he was dispossessed, the difference may fairly be considered as a part of the actual loss resulting to him from the change of possession, and should therefore be added to the original value to complete his indemnity. . . Even where the market value of the property, when the right of action accrued, would more then suffice to indemnify, it is not, in all cases, that the liability of the wrongdoer should be limited to that amount. It is for the value that he has himself realized, or might realize, that he is bound to account, and for which judgment should be rendered against him. Hence, should it appear in the evidence upon the trial, that he had in fact obtained on the sale of the property a larger price than its value when he acquired posses-

certain that the courts are by no means in agreement on this point; and some exceptions to the rule should certainly be admitted. Thus, if it can be shown that the plaintiff suffered by the wrongdoing of the defendant, a specific injury, as by the failure of a specific purpose for which he had bought the goods, or perhaps by the loss of a specific opportunity of selling them, at a certain profit, the principle of compensation would require that this should be taken into consideration. (*k*) And if a wilful and actual tort enter into the plaintiff's case, it has been held, that the defendant should be compelled to pay to the plaintiff all that the plaintiff may have lost in any way by his wrongdoing. (*l*)

We have considered the subject of accession or confusion of goods, to some extent, in the first volume. If a question arises in such a case as to the damages to be recovered, the law on this subject, as stated generally, by Blackstone, (*m*) is, no doubt, in

sion, or that he still retained the possession, and that an advanced price could then be obtained, in each case the increase upon the original value (which would otherwise remain as a profit in his hands), ought to be allowed as cumulative damages. . . It seems to us exceedingly clear, that the highest price for which the property could have been sold at any time after the right of action accrued, and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. When the evidence justifies the conclusion, that a higher price would have been obtained by the owner, had he kept the possession, or has been obtained by the wrongdoer, we have admitted and shown that it ought to be included in the estimation of damages; in the first case, as a portion of the indemnity to which the owner is entitled, and in the second, as a profit which the wrongdoer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is shown that it would not have been obtained by the owner, and has not been obtained by the wrongdoer." The highest market value, between the time of the conversion and that of the trial, was held to be the measure of damages in the following cases: Greening *v.* Wilkinson, 1 C. & P. 625; West *v.* Wentworth, 3 Cowen, 82; Clark *v.* Pinney, 7 Cowen, 681; Schley *v.* Lyon, 6 Ga. 530; Ewing *v.* Blount, 20 Ala. 694; Kid *v.* Mitchell, 1 Nott & McC. 334. In debt on bonds for the replacement of stock, the higher value of the stock at the time of the trial has been held the just measure of damages. Shepherd *v.* Johnson, 2 East, 211; McArthur *v.* Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 412. These cases are examined in Suydam *v.* Jenkins, 3 Sandf. 614, 632. But see Kortright *v.* Buffalo Com. Bank, 20 Wend. 91, 22 id. 348. In Massachusetts, the rule which makes the value at the time the right of action accrues, with interest thereon, the measure of damages for withholding property, seems to be established in all cases. Gray *v.* Portland Bank, 3 Mass. 364; Sargent *v.* Franklin Ins. Co. 8 Pick. 90, and cases cited, *supra*.

(*k*) Dunlop *v.* Higgins, 1 H. L. Cas. 381, 402, per *Cottenham*, Ld. Ch. See *supra*, note (*j*).

(*l*) Dennis *v.* Barber, 6 S. & R. 420; Hargar *v.* M'Mains, 4 Watts, 418. But see *supra*, note (*t*).

(*m*) Says Blackstone: "The doctrine of property arising from *accession* is grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession

force at this day, and in this country, so far as it relates to the title to property, which is all that he is speaking of. He uses the word "wilfully," in speaking of confusion. But it may be doubted, even on the authority of the civil law, to which Blackstone refers, whether, in a case of fraudulent confusion, the party in fault does not lose his goods; and on the other hand, it may be doubted whether, if the confusion be voluntary, but perfectly honest, the other party takes the whole property, without any allowance for the value added to his own. We cannot but think that the intent of the parties, and the moral character of the transaction, would enter into the law of the case, (o) So,

by natural or artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled, by his right of possession, to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species, — as, by making wine, oil, or bread out of another's grapes, olives, or wheat, — it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts. It hath even been held, if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman. But in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that, in both laws, the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his own consent. 2 Black. Com. 404, 405.

(o) Willard *v.* Rice, 11 Met. 493; Pratt *v.* Bryant, 20 Vt. 333; Wingate *v.* Smith, 20 Me. 287. In Ryder *v.* Hathaway, 21 Pick. 298, trespass was brought for carrying away and converting twenty-three cords of wood. The defendant justified, on the ground that the plaintiff had so mixed his own wood with the defendant's, that it was impossible to distinguish them. *Morton*, J., after citing from 2 Kent's Com. 297: "If A wilfully intermix his corn or hay with that of B, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B," said: "But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or that he was about to mingle his with his neighbor's by agreement, and mistakes the parcel. In such cases, which may be deemed accidental mixtures, it would be unreasonable and unjust, that he should lose his own, or be obliged to take his neighbor's. If they were of equal value, as corn, or wood, of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value, the rule would be more difficult. And if the intermixture were such as to destroy the property, the whole loss should fall on him whose carelessness, or folly, or misfortune caused the destruction of the

also, in a case of accession, to take the very instances given by Blackstone, if one innocently took a piece of cloth, or an ingot of gold, believing it to be his own, and quadrupled the value of the article by his skill and labor expended upon it, and refused to deliver it to the true owner, in the honest belief of his title, and without moral fault, — if the owner succeeded, in trover, in proving the property to be his, we are of opinion that the defendant would be allowed something by way of mitigation of damages, of recoupment, or in some other way, so that while the plaintiff was fully compensated, he should not be permitted to gain greatly, and the defendant made to suffer greatly, by his mere mistake. Indeed, the rule, as given in Blackstone, and sustained to some extent by the authorities in the Year-Books, would lead to this strange conclusion: that if one takes another's property, and expends upon it ten times its value in his labor, but without going so far as to change it into a different species, he loses all his labor, and the original owner gains it But if he goes so much further as to make this change, then he saves all the value of his labor, and the original owner can recover only the primitive value of the property taken (*p*)

whole." See Colwill *v.* Reeves, 2 Camp. 575. In Stephenson *v.* Little, 10 Mich. 433, it was *held*, that a party guilty of a fraudulent admixture of saw logs, owned by himself, with those owned by another, so that it is impossible any longer to identify his own, loses all interest in them, and is remediless, if such other person appropriate the whole mass to his own use.

(*p*) In cases where a party has, under a contract with the owner, increased the value of goods by his labor, and then converted them to his own use, the value of the goods, before the labor has been expended, has been given in damages. Dresser Manuf. Co. *v.* Waterston, 3 Met. 9. See Green *v.* Farmer, 4 Burr. 2214. But where goods have been wrongfully taken and their value increased by accession, the rule laid down in the Year-Book, 5 H. 7, fol. 15, is, that the owner can follow his property as long as the identity of the original material can be proved; but if the nature of the thing be changed, as grain into malt, or silver into money, so that the original material cannot be identified, the original owner loses his property, and can only claim damages for the article as originally taken. The first part of the rule, that the owner can follow his property as long as the identity of the original material can be shown, and take it without remunerating the wrongdoer for his trouble, has often been sanctioned. Betts *v.* Lee, 5 Johns. 349; Curtis *v.* Groat, 6 id. 168; Brown *v.* Sax, 7 Cowen, 95; Snyder *v.* Vaux, 2 Rawle. 427; Martin *v.* Porter, 5 M. & W. 351; Wood *v.* Morewood, 3 Q. B. 440, *in notis* As regards the first part of the rule, no distinction has been taken in any of the adjudications between a case where the wrongful taking was fraudulent and where it was by mistake. But as regards the second part of the rule, in the late case of Silsbury *v.* McCoon, 3 Comst. 379, a majority of the Court of Appeals overruled two previous decisions of the Supreme Court, in the same case, reported in 6 Hill, 425, and 4 Denio, 332, and decided, after a very able argument of the case, that a *wilful* wrongdoer can acquire no property in the goods of another, by any change whatsoever wrought in them

There are strong reasons, and authorities of much weight, in favor of the doctrine that special damages may be recovered in the action of trover, that is, damages in addition to the value of the goods, for losses on expenses directly and naturally resulting from the conversion; but it would seem that these special damages should be specially alleged in the declaration. (q)

If the plaintiff claims the property converted merely by a lien to secure a debt, he recovers only the amount of the debt, because that is the measure of his interest, if the defendant have any title or interest at all; (r) and this whether he be an origi-

by his labor or skill, provided it can be shown that the improved article was made from the original material; and consequently it was held, that the title to corn was not changed by its conversion into whiskey. The second part of the rule in the Year-Books was said to have no application in the case of a *wilful* wrongdoer. But where the improved property was not changed in its nature, so that it could be reclaimed by the original owner in all cases, no distinction was taken, between the rights of a wrongdoer who has acted with a fraudulent purpose, and one who has acted by mistake. *Ruggles*, J., in delivering the opinion of a majority of the court, said: "So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred-fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership." But this rigid rule has been questioned, and the opinion expressed in the text approved by several authorities. Brown *v.* Sax, 7 Cowen, 95, per *Sutherland*, J.; Silsbury *v.* McCoon, 4 Denio, 332, 337, per *Bronson*, J. See Benjamin *v.* Benjamin, 15 Conn. 347, 358.

(q) In Suydam *v.* Jenkins, 3 Sandf. 614, 627, *Duer*, J., said: "In England, the law may be considered as settled, that additional damages, if laid in the declaration, and directly resulting from the wrongful act of the defendant, are recoverable. (Davis *v.* Oswell, 7 C. & P. 804; Bodley *v.* Reynolds, 8 Q. B. 779; Rogers *v.* Spence, 13 M. & W. 571.) And an early decision to the same effect, is found in our own reports. (Shotwell *v.* Wendover, 1 Johns. 65.) It is true, that in Brizsee *v.* Maybee (21 Wend. 144), Mr. J. *Cowen*, speaking as the organ of the court, seems to have held, that under no circumstances ought the jury to be permitted to find special damages in the action of trover; and the Supreme Court of Pennsylvania seems to have given its sanction to the same doctrine (Farmers Bank *v.* McKee, 2 Penn. St. 318); but as this doctrine, literally understood, in effect denies the right of the plaintiff to a full indemnity, however certain the evidence of his loss, the language of the learned judges ought perhaps to be construed as only meaning, special damages ought never to be allowed, where, from the nature of the case, the estimate must be uncertain and conjectural; and the doctrine, thus explained and limited, we are far from wishing to controvert."

(r) Hays *v.* Riddle, 1 Sandf. 248; Ingersoll *v.* Van Bokkelin, 7 Cowen, 670; Spoor *v.* Holland, 8 Wend. 445; Lloyd *v.* Goodwin, 12 Smedes & M. 223; Strong *v.* Strong, 6 Ala. 345; Cameron *v.* Wynch, 2 Car. & K. 264. In Hickok *v.* Buck, 22 Vt. 149, the defendant leased to the plaintiff a farm for one year, and by the contract was to provide a horse for the plaintiff to use upon the farm for that term. He furnished the horse, but took him away and sold him before the expiration of the term, without providing another. It was held, that the plaintiff acquired a special property in the horse, and was entitled to recover, in an action of trover, damages for the loss of the use of the horse during the residue of the term.

nal mortgagee, or a purchaser of the mortgagee, or a purchaser of the mortgagee's rights. (*s*) But if the defendant be a mere stranger, the plaintiff has a title to the whole, as against him, and recovers the whole value. (*t*) Where a pledgee tortiously withholds the pledge, or has sold it, without calling on the pledgor to redeem, and the pledgor bring an action against him, the pledgee may have the amount of his debt deducted or recouped in the assessment of damages. (*u*)

4. In the Action of Replevin.

By the action of replevin, the plaintiff, having taken property which he calls his own, seeks to establish his title; and the defendant, denying the plaintiff's title, endeavors to establish his own. But, incidental to these questions of title, are those of damages. The plaintiff claims compensation for the wrong done to him, in taking his goods and compelling him to resort to this process to recover them. The defendant claims to have his goods back again, and also damages for taking them by this process. (*v*) We should apply here the same principles which have been already stated in relation to trover; each party may claim complete compensation, and no more. The plaintiff has the goods, and if he succeeds should have so much more as he has lost, or the defendant has gained, or might well have gained by the taking and detention of them. If the defendant succeed, he should have, beside his judgment for a return, damages to cover his direct loss by the taking and detention. (*w*) Which-

(*s*) Parish *v.* Wheeler, 22 N. Y. (8 Smith), 494.

(*t*) White *v.* Webb, 15 Conn. 302; Lyle *v.* Barker, 5 Binney, 457; Schley *v.* Lyon, 6 Ga. 530. In Heydon & Smith's case, 13 Rep. 67, it is laid down: "So is the better opinion in 11 H. 4, 23, that he who hath a special property in goods, shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated; but clearly the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over." These remarks apply as well to trover as to trespass.

(*u*) Jarvis *v.* Rogers, 15 Mass. 389; Stearns *v.* Marsh, 4 Denio, 227. And see *ante*, vol. II. pp. 118–120.

(*v*) Bruce *v.* Learned, 4 Mass. 614, 617, per *Parsons*, C. J. If the jury find the property to be part in the plaintiff, and part not, each party is entitled to damages and costs. Powell *v.* Hinsdale, 5 Mass. 343.

(*w*) Rowley *v.* Gibbs, 14 Johns. 385. See *supra*, note (*j*). In Veazie *v.* Somerby, 5 Allen, 280, it was *held*, that in an action of replevin of property against a claimant of the same by purchase, the de-

ever party establishes his property in the goods, has also a right to have made good to him by damages, any deterioration which they may have suffered while wrongfully in the hands of the other party. (*x*) This rule, however, is subject to the qualification, that a plaintiff in replevin, who retains the articles replevied until judgment in the suit, cannot claim damages for any depreciation in their value, during that period; because he might sell them immediately in such a manner as to ascertain their value, for which alone he is answerable on his bond. (*y*)

It has been held, that an action on the replevin bond is defeated by the destruction of the property in the hands of the plaintiff in replevin, by the act of God before the judgment. (*z*) But this decision has been much doubted, on the ground that if one takes property from its true owner, if it be destroyed in the hands of the taker, it should be regarded as his loss, and not as the loss of the owner. (*a*) Such would doubtless be the decision if the same defence were attempted against an action of trespass or trover.

The question as to the time when the value of the goods should be taken, to which we have alluded in speaking of trover, may also arise in an action on the replevin bond, or if the defendant prevails in the original suit; and we think it must be governed by the principles we have already stated as applicable to that action. (*b*)

In an action upon a replevin bond, the value of the property, as indorsed upon it, is, at the plaintiff's election, taken as its true value. (*c*)

fendant may show the amount of expenditures made by him in improving the property, after the same came into his possession, for the purpose of proving damages.

(*x*) Rowley *v.* Gibbs, 14 Johns. 385.

(*y*) Gordon *v.* Jenney, 16 Mass. 465.

(*z*) Carpenter *v.* Stevens, 12 Wend. 589.

(*a*) Suydam *v.* Jenkins, 3 Sandf. 614, 643, per *Duer*, J.

(*b*) *Supra*, note (*j*). The value of the goods at the time of the service of the writ of replevin, with interest until the rendition of judgment, is held to be the ordinary measure of damages when the defendant prevails. Brizsee *v.* Maybee, 21 Wend. 144; Mattoon *v.* Pearce, 12 Mass. 406; Barnes *v.* Bartlett, 15 Pick. 71; M'Cabe *v.* Morehead, 1 Watts & S. 516; Caldwell *v.* West, 1 N. J. 411, 422.

(*c*) Middleton *v.* Bryan, 3 M. & S. 155; Huggeford *v.* Ford, 11 Pick. 223; Parker *v.* Simonds, 8 Met. 205. In an action of debt on a replevin bond, the original plaintiffs having failed in their action, and a writ of restitution having been issued, by virtue of which the defendant demanded the goods, he was held entitled to the value of the goods at the time of the demand. Swift *v.* Barns, 16 Pick. 194. See also, Howe *v.* Handley, 28 Me. 241, and Suydam *v.* Jenkins, 3 Sandf. 614, 645, per *Duer*, J.

If the writ, in replevin, is sued out maliciously, it has been held, that exemplary damages may be given in this case, as for a wanton and malicious trespass. (*d*) But in an action on a replevin bond, it is also said, that counsel fees, or compensation for attendance at court in the replevin suit, cannot be recovered. (*e*)

If one of the parties has but a qualified right in the property, as by attachment or lien to secure a debt, he recovers only to the extent of that lien or interest, unless the other party fails to make out any rightful title or interest whatever. (*f*) Nor can the defendant recover the value of the whole property, if, after the action commenced, he repossessed himself of a part of it. Although the plaintiff is nonsuited in an action of replevin, he may still offer testimony to prove ownership of the property in himself, upon inquiry into the right of the defendant's possession, for the purpose of showing that the defendant has sustained no subtantial damage, as the plaintiff was the owner of the property. (*g*) This action being, as it is said, in substitution of the old action *de bonis asportatis*, must be governed, at least in this respect, by the rules of that action. (*h*)

5. Where a Vendee sues a Vendor.

If a vendee, to whom the vendor has not delivered the articles sold agreeably to his contract, brings an action for the breach, he may be said to have sustained no loss unless the articles have risen in value. He could not maintain his action without tendering the price, and if the articles would bring no more than this, he would gain nothing if they were delivered to him, and loses nothing if they are withheld. But although they may have gained nothing in value up to the time when they should

(*d*) M'Donald *v.* Scaife, 11 Penn. St 381; Brizsee *v.* Maybee, 21 Wend. 144; Cable *v.* Dakin, 20 id. 172; M'Cabe *v.* Morehead, 1 Watts & S. 516.

(*e*) Davis *v.* Grow, 7 Blackf. 129.

(*f*) Scrugham *v.* Carter, 12 Wend. 131; Lloyd *v.* Goodwin, 12 Smedes & M. 223. In Jennings *v.* Johnson, 17 Ohio, 154, it was *held*, that if property be replevied from a sheriff holding it under execution, and the issue be found for the defendant, if the value of the property be greater than the amount of the execution, the rule of damages is the amount of the execution with interest thereon; but if the value of the property be less than the amount of the execution, then the measure of damages is the full value of the property.

(*g*) Harman *v.* Goodrich, 1 Greene, (Iowa), 13. See also, Wallace *v.* Clark, 7 Blackf. 298.

(*h*) De Witt *v.* Morris, 13 Wend. 496.

have been delivered, they may have gained greatly since, and it is precisely for the loss of this gain that the vendee demands compensation. A distinction is made here, by some authorities, which does not appear to us to rest upon perfectly satisfactory and conclusive reasons. It is said, that if the vendee bought on credit, the value of the goods at the time of the purchase, or at the time when delivery was due, should be taken as the measure of damages. But if he paid the price down, or in advance, then he is entitled, not only to their increase in value at the time he brings his action, but to any increase which may have taken place at any intermediate period between the purchase and the action, even if the value had fallen again before the action. (*i*) But if compensation is to be the measure, it would be difficult to find a very good reason for this difference. It may, indeed, be said, that one who buys not only on credit, but without any definite period of payment, and who acquires a right to the goods only by tendering the price, and makes this tender only when he brings the action, necessarily fixes that time as the time of the purchase, of the delivery, and of the standard of value. (*j*) But if one buys to-day, the goods to be delivered to-day, and the price is to be paid in three months, and the goods are withheld without sufficient cause, there does not seem to be any clear and convincing reason for giving him a compensation different from that to which he would be entitled as damages, if he paid the price down. (*k*) We have consid-

(*i*) Shepherd *v.* Hampton, 3 Wheat. 200; *Marshall*, C. J.: "The only question is, whether the price of the article at the time of the breach of the contract, or at any subsequent time before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article at the time it was to be delivered, is the measure of damages. For myself only, I can say, that I should not think the rule would apply to a case where advances of money had been made by the purchaser under the contract." This distinction was adopted in Clark *v.* Pinney, 7 Cowen, 681, with the qualification, that in order to recover the highest price between the period for delivery and the day of trial, the suit must be brought within a reasonable time. Davis *v.* Shields, 24 Wend. 322. In suits on bonds for the replacement of stock, the higher value thereof on the day of trial has been allowed as the measure of damages. Shepherd *v.* Johnson, 2 East, 211; M'Arthur *v.* Seaforth, 2 Taunt. 257; Harrison *v.* Harrison, 1 C. & P. 412; Downes *v.* Back, 1 Stark. 318. See Tempest *v.* Kilner, 3 C. B. 249. But the authority of these cases in this country is very doubtful; Wells *v.* Abernethy, 5 Conn. 227; per *Hosmer*, C. J.; Gray *v.* The Portland Bank, 3 Mass. 390; Suydam *v.* Jenkins, 3 Sandf. 632–636. They have, however, been recently approved of in Connecticut. West *v.* Pritchard, 19 Conn. 212. See Com Bank of Buffalo *v.* Kortright, 22 Wend. 348, Wilson *v.* Little, 2 Comst. 443.

(*j*) Suydam *v.* Jenkins, 3 Sandf. 639.

(*k*) This distinction has, in some cases,

ered a similar question, — as to the time when the value of property is to be taken, — repeatedly, because different principles have been applied to it in different actions. But we doubt if this be wise or just. If we adhere to the simple rule of compensation, we should say, that in every action to recover damages for the wrongful detention of personal property, the plaintiff should recover full compensation for the loss of all that he might fairly have gained during the whole period of the defendant's misappropriation; and the defendant should be supposed to have made his wrongful act as profitable to himself as the market at any time permitted, — excepting, perhaps, accidental and momentary inflations, — and should he compelled to give over this profit to the plaintiff. And it will be seen in our notes, that we have recent authority for this general rule. (*l*)

been overruled, and the value of the property at the time and place of the promised delivery, taken as the measure of damages, without reference to the previous payment of the consideration. Smethurst *v.* Woolston, 5 Watts & S. 106; Smith *v.* Dunlap, 12 Ill. 184; Bush *v.* Canfield, 2 Conn. 485; Wells *v.* Abernethy, 5 id. 222; Vance *v.* Tourne, 13 La. 225; Sargent *v.* The Franklin Ins. Co. 8 Pick. 90; Startup *v.* Cortazzi, 2 Cromp. M. & R. 165. Where the price has not been paid by the vendee, the authorities generally agree; some of them, not noticing the distinction we have mentioned, that the difference between the market value of the goods at the time of the promised delivery, and the contract price, is the measure of damages. Leigh *v.* Paterson, 8 Taunt. 540; Gainsford *v.* Carroll, 2 B. & C. 624; Peterson *v.* Ayre, 13 C. B. 383, 24 Eng. L. & Eq. 382; Boorman *v.* Nash, 9 B. & C. 145; Shaw *v.* Holland, 15 M. & W. 136; Douglas *v.* M'Allister, 3 Cranch, 298, Cranch, C. C. 241; Gilpins *v.* Consequa, Pet. C. C. 85; Dey *v.* Dox, 9 Wend. 129; Beals *v.* Terry, 2 Sandf. 127; Clark *v.* Dales, 20 Barb. 42; Dana *v.* Fiedler, 2 Kern. 40; Tobin *v.* Post, 3 Cal. 373; Shaw *v.* Nudd, 8 Pick. 9; Swift *v.* Barnes, 16 id. 194; Smith *v.* Berry, 18 Me. 122; Marchesseau *v.* Chaffee, 4 La. An. 24. There are cases which hold, that in trover, the highest value of the goods at any intermediate period between the conversion and the trial, is the measure of damages. West *v.* Wentworth, 3 Cowen 82; Greening *v.* Wilkinson, 1 C. & P. 625. See Fisher *v.* Prince, 3 Burr. 1363; Whitten *v.* Fuller, 2 W. Bl. 902. In detinue, for railway scrip, the measure of damages was held to be the difference between its value when demanded and its depreciated value when delivered up. Williams *v.* Archer, 5 C. B. 318, 2 Car. & K. 26; Tempest *v.* Kulner, 3 C. B. 249. See Com. Bank of Buffalo *v.* Kortright, 22 Wend. 348; Wilson *v.* Little, 2 Comst. 443.

(*l*) Suydam *v.* Jenkins, 3 Sandf. 614. See *supra*, note (*j*). Dunlop *v.* Higgins, 1 H. L. Cas. 381, 403. Lord Chancellor *Cottenham*: "Suppose, for instance, a party who has agreed to purchase 2,000 tons of pig iron, on a particular day, has himself entered into a contract with somebody else, condition for the supply of 2,000 tons of pig iron, to be delivered on that day, and that he, not being able to obtain those 2,000 tons of pig iron on that particular day, loses the benefit arising from that contract. If pig iron had only risen a shilling a ton in the market, but the pursuers had lost £1,000 upon a contract with a railway company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the pig iron at that increased price, but also that profit which would have been received if the party had performed his contract. No other rule is reconcilable with justice, nor with the duty which the jury had to perform — that of deciding

In determining what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; (m) and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. (n) The question of measurement of damages by a market value is peculiarly one for the jury. But a court would not willingly permit them to take any extreme of valuation, whether high or low, which contradicted existing facts, and rested only on a merely speculative opinion of a future want or excess. The plaintiff should not be permitted to make a profit by the breach of his contract, which he could not have naturally expected to make by its performance; nor should he be subjected to a loss, and the defendant be permitted to make a saving, on a merely speculative possibility. The inquiry always should be, what was the value of the thing at that time, taking into consideration all proved facts of price and sale, and all rational and distinct probabilities, and nothing more. (o)

the amount of damage which the party had suffered by the breach of his contract." But in trover for goods sold, it was held, in Massachusetts, that the rule of damages is their value at the time of the conversion, notwithstanding the vendor has resold them at an advanced price before the trial. Kennedy *v.* Whitwell, 4 Pick. 466. See Hanna *v.* Harter, 2 Pike, 397, where, in an action against a vendor for refusing to complete a contract of sale, it was held, that the sum at which he resold the article does not establish its market value.

(m) Joy *v.* Hopkins, 5 Denio, 84.

(n) Younger *v.* Givens, 6 Dana, 1.

(o) Blydenburgh *v.* Welsh, 1 Baldw. 331, 340. Per *Hopkinson*, J.: "It is the price — the *market price* of the article, that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value* — the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour, for instance, under a false rumor, which if true would augment its value, may suspend their sales and put a price upon it, not according to its value in the actual state of the market, or the actual circumstances which affect the market, but according to what, in their opinion, will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth on a future day, if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance.' See Smith *v.* Griffith, 3 Hill, 333.

If the vendee objects that the articles are not such as he bargained for, he may rescind the contract as a whole, but as we have seen, not as to a part. If, therefore, he has received a part of the goods, he cannot retain them and have damages on the non-delivery of the whole; nor can he require the delivery of the residue, after he has ascertained their quality, and then have his claim for damages, for their inferiority. (*p*)

If the vendee sues the vendor because he has not been able to make a good title under his contract, it is said that he may recover for the expense of investigating the title, but not damages for the loss of the bargain, or his endeavors to substitute a new one. (*q*)

6. Where a Vendor sues a Vendee.

If a vendor sues the vendee, he demands, by way of damages, the price the vendee should have paid. Usually this is fixed by the parties; if not, it may be fixed by subsequent facts, as by a *bona fide* sale by the vendee. (*r*) If not, then a fair price must be given, as ascertained by testimony. If the goods remain in the vendor's hands, it may be said that now all his

Younger *v.* Givens, 6 Dana, 1. Evidence of value at places in the vicinity of the place of delivery, may be admitted to show the value at that place. But where the evidence is clear and explicit as to the value at that place, such value must control, no matter what the value is at other places. Gregory *v.* McDowel, 8 Wend. 435.

(*p*) Shields *v.* Pettee, 2 Sandf. 262. The defendants purchased of the plaintiffs one hundred and fifty tons of pig iron, No. 1, to arrive in the ship Siddons. The iron which arrived was not of that quality, and for that reason the defendants, after receiving a part, refused to receive the remainder, or pay the contract price for the part already received. In the mean time the market price had risen, so that iron of the quality delivered was worth two or three dollars per ton more than the contract price. This action was brought for the value of the iron delivered. *Oakley*, C. J., said: "Assuming the contract to be obligatory, the defendants, on finding the iron they were receiving was not No. 1, were at liberty to continue to receive it as a fulfilment of their purchase, or they could have repudiated the delivery and brought their action for damages. But they could not do both. They had no right to receive a part of the goods, retain such part, and refuse to receive the residue." Accordingly it was held, that the defendants could not recoup damages for the non-fulfilment of the contract by the plaintiffs, but that they were bound to pay the market price of the iron delivered.

(*q*) Pounsett *v.* Fuller, 17 C. B. 660.

(*r*) In Greene *v.* Bateman, 2 Woodb. & M. 359, there was such a misunderstanding as to the price that no express contract could be proved. But the vendee having offered to return the goods, and the offer having been declined, sold them. It was *held*, in an action of assumpsit, that he must be treated as the trustee of the vendor, selling on his account and for his benefit, and liable to the vendor for the price received, deducting compensation for his services.

damage is the difference between their value and the price to be paid; which may be nothing. This would be true if the vendor chose to consider the articles as his own, or if the law obliged him to consider them as his own. (*s*) But it does not seem that the law lays upon him any such obligation. He may consider them as his own, if there has been no delivery; or he may consider them as the vendee's, and sell them, with due precaution, to satisfy his lien on them for the price, and then he may sue and recover only for the unpaid balance of the price; or he may consider them as the property of the vendee, subject to his call or order, and then he recovers the whole of the price which the vendee should pay. (*t*) As the action, in

(*s*) Stanton *v.* Small, 3 Sandf. 230; McNaughter *v.* Cassally, 4 McLean, 530; Whitmore *v.* Coats, 14 Mo. 9; Thompson *v.* Alger, 12 Met 428; Girard *v.* Taggart, 5 S. & R. 19. In Allen *v.* Jarvis, 20 Conn. 38, the defendant contracted with the plaintiff to manufacture a number of surgical instruments, of which the defendant was patentee. After they were finished, the defendant refused to accept them. The plaintiff recovered the full price agreed upon, on the ground that the instruments were of no value to him. *Storrs*, J., said: "The rule of damages, in an action for the non-acceptance of property sold or contracted for, is the amount of actual injury sustained by the plaintiff, in consequence of such non-acceptance. This is ordinarily the difference between the price agreed to be paid for it, and its value, where such price exceeds the value. If it is worth that price the damages are only nominal. But there may be cases where the property is utterly worthless in the hands of the plaintiff, and there the whole price agreed to be paid should be recovered. The present appears to us to be a case of this description. The articles contracted for were those for the exclusive right of making and vending which the defendant has obtained a patent. They could not be lawfully sold by the plaintiffs, and were, therefore, worthless to them." Where the vendee gives notice before the day of delivery that he will not accept the goods, the measure of damages in an action against him by the vendor, is till the difference between the contract price and the market price, when they should have been delivered, and he cannot have them assessed at the market value of the goods at the time when the notice was given. Phillpotts *v.* Evans, 5 M. & W. 475.

(*t*) Sands *v.* Taylor, 5 Johns. 395; Langfort *v.* Tiler, 1 Salk. 113; 6 Mod. 162; Jones *v.* Marsh, 22 Vt. 144; Wilson *v.* Broom, 6 La. An. 381; Gaskell *v.* Morris, 7 Watts & S. 32; Boorman *v.* Nash, 9 B. & C. 145. In Sands *v.* Taylor, the defendants purchased of the plaintiffs a cargo of wheat. After accepting a part they refused to accept the remainder. After giving notice to the defendants the plaintiffs sold the wheat in their hands at auction. *Van Ness*, J., said: "Nothing, therefore, is more reasonable, than that the plaintiffs, who were not bound to store or purchase the wheat, should be permitted to sell it, at the best price that could be obtained. The defendants have no right to complain. Had they taken the wheat, as they ought to have done, a sale by the plaintiffs would not have been necessary. The recovery here is only for the difference between the net proceeds of that sale, and the price agreed upon in the original contract." Bement *v.* Smith, 15 Wend. 493; Graham *v.* Jackson, 14 East, 498. In Bement *v.* Smith, the plaintiff built a carriage for the defendant, according to an agreement, tendered it to him, and on his refusal to accept it, deposited it with a third person on his account, giving the defendant notice of the deposit, and brought an action of assumpsit. It was *held*, that the plaintiff was entitled to recover the price agreed upon. But in Laird *v.* Pim, 7 M. & W. 474, 478, *Parke*, B., said: "A party cannot re-

either case, proceeds upon the breach of the contract by the vendee, it seems reasonable that this election should be given to the vendor, and no part of it to the vendee. But if the vendor has not the goods himself, but contracts with a third party for them, it is said (but not, as we think, for good reasons), that he now recovers only the difference between the market value and the contract price. But if this contract to buy was absolute and obligatory, and he had the goods in his control, so that his vendee might have them on demand, it might not be easy to discriminate this case from the other, on principle. (*u*)

If the goods are sold on credit, that is, if it is a part of the contract of sale, that payment shall be made at a future day, there can, of course, be no suit for the price until that day. But if it is also a part of the contract that a note or bill of

cover the full value of the chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again." See also, Dunlop *v.* Grote, 2 Car. & K. 153; Thompson *v.* Alger, 12 Met. 428, 443. In this last case, the contract was for the purchase of railroad shares, and they had already been transferred to the vendee, on the books of the company, and he refused, after the transfer, to receive them; the vendor was held entitled to recover the contract price; but the court were of opinion, that if the refusal had preceded the transfer, the difference between the agreed price and the market value on the day of delivery would have been the measure of damages. *Dewey*, J.: "The plaintiff is entitled to recover the whole amount stipulated to be paid for the stock. The argument against such recovery is, that this stock was never accepted by the defendant; that this, at most, was a mere contract to purchase; and that the defendant, having repudiated it, is only liable to pay the difference between the agreed price and the market value of the stock on the day of the delivery. Such would be the general rule as to contracts for the sale of personal property; and such rule would do entire justice to the vendor. He would retain the property as fully in his hands as before, and a payment of the difference between the market price and that stipulated would fully indemnify him. Such would have been the rule in this case if nothing had been done to change the relations of the parties. If, for instance, the defendant had repudiated the contract, before any transfer of stock to him had been made on the books of the corporation, it might properly have applied here. But this is a case of somewhat peculiar character, in this respect. The contract of the vendor to sell to the defendant one hundred and eighty shares of railroad stock, required a previous transfer of the shares on the books of the corporation. This, from the very nature of the case was a previous act; and when done, it passed the property on the books of the company to the defendant."

(*u*) For this distinction, see Sedgwick on Damages, p. 283, citing Stanton *v.* Small, 3 Sandf. 230; McNaughter *v.* Cassally, 4 McLean, 530. But we think this distinction is without foundation. The circumstances, in the first case, that the goods were not in the possession of the vendor, but only contracted for, was not alluded to by the court in assessing damages. The plaintiff only claimed what the court allowed. The cases seem to show that a vendor may, on default of vendee, not only elect to resell and charge the vendee for the loss on the resale, or sue for the contract price, considering the goods as the vendee's; but may also elect to consider them as his own, the contract being rescinded, and sue for the special damage; i. e. the difference between the market value and the agreed price.

exchange shall be given immediately, which is to be payable on that future day, if this be not given an action can at once be maintained for it; not only because it is a separate promise, but because, by the practice of merchants, this note or bill might be made, by the vendor's getting it discounted, the means of present payment. (*v*)

If the sale was with warranty, and an action is brought on a breach of the warranty, if the vendee may not rescind the contract and return the goods, — a question we have considered elsewhere, (*w*) — he can have no other compensation than that which would make up the difference between what the goods are and what they ought to be. Nor is the price paid for the article any thing more than *prima facie* evidence of the value which it should have had, if it is even so much. The jury cannot assume that the warrantor only agreed that the thing purchased should be worth what was given for it, because the purchaser may have been induced by the low price to make the purchase. He has a right to have just such goods as the vendor agreed to sell, and compensation for the whole difference by which they fall short of this, without reference to the price paid for the goods. (*x*) He may also recover for the con-

(*v*) Hanna *v.* Mills, 21 Wend. 90; Rinehart *v.* Olwine, 5 Watts & S. 157; Hutchinson *v.* Reid, 3 Camp. 329. See also, Mussen *v.* Price, 4 East, 147; Dutton *v.* Solomonson, 3 B. & P. 582. In the action for not giving the note, the measure of damages is the full price of the goods. Hanna *v.* Mills; Rinehart *v.* Olwine.

(*w*) Vol. 1, p. 592.

(*x*) Clare *v.* Maynard, 7 C. & P. 741, 6 A. E. 519, *note;* Curtis *v.* Hannay, 3 Esp. 82; Woodward *v.* Thatcher, 21 Vt. 580; Worthy *v.* Patterson, 20 Ala. 172; Slaughter *v.* McRae, 3 La. An. 453; Thornton *v.* Thompson, 4 Gratt. 121; Voorhees *v.* Earl, 2 Hill, 288; Freeman *v.* Clute, 3 Barb. 424; Comstock *v.* Hutchinson, 10 id. 211. In Cary *v.* Gruman, 4 Hill, 625, the action was for a breach of a warranty, in the sale of a horse. The measure of damages was held to be the difference between what would have been its value as a sound horse and its value with the defects. *Cowen*, J., said: "The rule undoubtedly is, that the agreed price is strong evidence of the actual value; and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it. It is sometimes the value of the article as between them, rather than its general worth, that is primarily to be looked to; a value which very likely depended on considerations which they alone could appreciate. Things are, however, very often purchased on account of their cheapness. In the common language of vendors, they are offered at a great bargain, and when taken at that offer on a warranty, it would be contrary to the express intention of the parties, and perhaps defeat this warranty altogether, should the price be made the inflexible standard of value. A man sells a bin of wheat at fifty cents per bushel, warranted to be of good quality. It is worth one dollar if the warranty be true; but it turns out to be so foul that it is worth no more than seventy-five cents per bushel. The purchaser is as much entitled to his twenty-five cents per bushel in damages as he would have

sequential injury he has sustained by reason of the breach of warranty, if it were the immediate, direct, and natural consequence, but not otherwise. (*y*) Thus, if goods are warranted fit for a particular purpose, the purchaser is entitled to recover, in his action for breach of the warranty, what they would have been worth to him if they had conformed to the warranty. (*z*)

7. Whether Expenses may be included in Damages.

A question sometimes occurs in these cases, and also in many other actions where damages are demanded, as we have already intimated, which cannot always be answered by direct and unquestioned authority. It is, whether the plaintiff may include in his damages the expenses of litigation. Thus, if one sells a horse with warranty, and the buyer is notified by a third party that the horse is his, and requested to deliver it to him, and this the buyer refuses to do, and defends against an action in which this third person succeeds in proving the horse to be his property; and then the buyer resorts to the seller on his warranty, can he now claim from him the expenses of his unsuccessful defence, either on the ground that it was the direct and immediate consequence of the breach of warranty, or that it was for the benefit of the seller.

It is obvious, in the first place, that this question must be affected somewhat by the presence or absence of fraud, or any wilful wrong, on the part of the defendant; for if that comes into the case it would seem to enlarge the discretion of the jury

been by paying his dollar, or if he had given two dollars per bushel he could recover no more." The measure of damages was once held to be the difference between the price paid and the value of the article with defects. Caswell *v.* Coare, 1 Taunt. 566. The measure of damages, in an action brought for a breach of an implied warranty of title, in the sale of a horse, is the price paid by the purchaser with interest thereon, and the cost recovered of him or his vendee, in a suit brought by the actual owner. Armstrong *v.* Percy, 5 Wend. 535. In Coolidge *v.* Brigham, 1 Met. 547, where the indorsements on a promissory note warranted genuine proved to be forged, it was held, that the measure of damages would be the difference between the amount of the note and its actual value, whatever that may be.

(*y*) In an action for the breach of warranty on a sale of a horse, the expense of selling him, and of keeping him for such reasonable time as may be necessary to effect a sale at the best advantage, is recoverable as special damage. Clare *v* Maynard, 7 C. & P. 741; Ellis *v.* Chinnock, 7 C. & P. 169; M'Kenzie *v.* Hancock, Ryan & M. 436; Chesterman *v* Lamb, 4 Nev. & M. 195, 2 A. & E. 129.

(*z*) Bridge *v.* Wain, 1 Stark. 504.

as to the amount of damages, and also the equity of the plaintiff's claim. But if, supposing no wilful wrong to be alleged or shown, and therefore, that both parties are equally innocent, if we then say that the plaintiff may always reclaim his expenses of litigation, this would give him the power of subjecting the defendant to the heavy costs of defending against a suit where there was no defence, which the defendant never would have defended, nor the plaintiff, had he not known that he was doing so out of another's purse. But if we say that these expenses shall never be recovered, the plaintiff must then either be justified in abandoning the thing he bought to the first adverse claimant, and the mere fact of the claim be held enough to establish his right to sue on the warranty, which would be absurd, or else he would be bound to maintain at his own cost a title which he had paid for and which another had warranted.

In truth, it would be impossible to lay down a universal rule, because the question, as it arises in each case, must be determined by the merits and circumstances of that case. But through all of them the principle of compensation must be regarded; and this would lead to the conclusion, that wherever the litigation was entered into by the buyer, not only in good faith, but on reasonable grounds, and it could be viewed as a measure of defence proper for the interests both of buyer and seller, and, perhaps, when due notice of the claim, the action and the proposed defence were given to the warrantor, there the plaintiff should be allowed the expenses of the defence in his damages, and otherwise, not. For practical purposes, it would be, we think, of great importance for a buyer, threatened with the loss of his purchase by an adverse claimant, to give notice to his seller and warrantor, somewhat on the old principle of voucher. For if the seller did not choose to defend, the buyer might then safely abandon the property, unless he preferred to defend his title on his own account. And if the seller took notice and defended the suit, the buyer would either have his title confirmed without costs to himself, or an unquestionable claim on the warranty. (*a*) And, for the same reasons, it would

(*a*) Blasdale *v.* Babcock, 1 Johns. 517; Coolidge *v.* Brigham, 5 Met. 68. In Lewis *v.* Peake, 7 Taunt. 153, the plaintiff bought a horse of the defendant, with

doubtless be expedient for any party to give notice, who is to look to another for compensation for property taken from him by a third party, on other grounds than those of warranty.

8. When Interest is included.

There is another element which enters into the damages given for breach of contract, for the purpose of making these damages compensation; and this is interest. In general, where the injury complained of consists in the non-payment of money, the amount unduly withheld, together with the interest on that amount, during the period of the withholding, makes up the whole compensation, because the law assumes that interest, or the money paid for the use of money, is the exact measure of the worth of money. This would be very nearly true, in fact, of the rate of interest actually paid in the market, if this were wholly unaffected by the usury laws. But the law assumes that the rate of interest which it allows is that which, on the whole, interest ought to be, and fixes the rate on that ground, and therefore assumes, in every case, that this standard measures the use which the plaintiff might have made of his money. The questions which arise in relation to interest, we have already considered in our previous chapter on interest and usury.

warranty, and relying thereon sold it to one Dowling, with a warranty. The plaintiff, being sued by Dowling for a breach of the warranty, gave notice of the action to the defendant, and, as he received no answer, defended the action. Dowling recovered the price of the horse, and £88 costs. The plaintiff, in an action against the defendant for a breach of the warranty, was held entitled to recover the costs which he had paid, in the suit brought by Dowling. *Gibbs*, C. J., said: "The plaintiff was induced, by the warranty of the defendant, to warrant the horse to a purchaser; he gave notice to the defendant of the action, and receiving no directions from the defendant to give up the case, he proceeded to defend, and was cast; those costs and damages are therefore a part of the damages which the plaintiff has sustained by reason of the false warranty found against the defendant. I therefore am of opinion, that the plaintiff was entitled to recover these damages." But the expense of defending a suit beyond the taxed costs cannot, it seems, be recovered. Armstrong *v.* Percy, 5 Wend. 535; *ante*, p. 164, n. (*j*). And the taxed costs cannot be recovered, even if notice of the suit have been given, if the defect in the thing warranted could have been discovered on reasonable examination, so that the defence of the action was rash and improvident. Wrightup *v.* Chamberlain, 7 Scott, 598. See Penley *v.* Watts, 7 M. & W. 601, per *Parke*, B.

SECTION VIII.

OF THE BREACH OF CONTRACT TO PAY MONEY OR GOODS, IN THE ALTERNATIVE.

If a note or written promise be to pay so much money, but in goods specified, and at a certain rate, and the promise is broken, it is not quite settled whether the law will regard this as a promise to pay money, or deliver these goods; and it may be a very important question if the goods have varied much in value. Thus, if one fails in his promise to pay one thousand dollars in flour, at five dollars a barrel, and when the flour should be delivered it is worth six dollars a barrel, and, not being delivered, an action is brought, the question is, whether the defendant should pay one thousand dollars, or the worth of two hundred barrels of flour at six dollars each, that is, twelve hundred dollars. The true question is, whether it was intended that the promisor might elect to pay the money or deliver the articles; or, in other words, whether it was agreed only that he owed so much money, and might pay it either in cash or goods, as he saw fit. There might be something in the form of the promise, in the *res gestæ*, or in the circumstances of the case, which, by showing the intention of the parties, would decide the general question; but in the absence of such a guide, and supposing the question to be presented merely on the note itself, as above stated, we should say that the more reasonable construction would be, that it was an agreement for the delivery of goods in such a quantity as named, and of such a quality as that price then indicated. And on a breach of this contract, the promisor should be held to pay, as damages, the value of so much of such goods, at their increased or diminished price. (*b*) But if the promise be only to pay one thousand

(*b*) Meason *v.* Philips, Addis. 346; Price *v.* Justrobe, Harper, 111; Cole *v.* Ross, 9 B. Mon. 393; Clark *v.* Pinney, 7 Cowen, 681; Mattox *v.* Craig, 2 Bibb, 584; M'Donald *v.* Hodge, 5 Hayw. 85; Edgar *v.* Boies, 11 S. & R. 445, per

dollars at a certain time, in flour, then this sum is to be paid, either in flour or in money, at the election of the payor. (*c*)

Gibson, J. See Wilson *v.* George, 10 N. H. 445. In Meason *v.* Philips, the defendant, the lessee, covenanted to pay rent in good merchantable grain; wheat, at four shillings; rye, at three shillings; and corn, at two shillings and sixpence per bushel. It was *held*, that the damages were to be ascertained by valuing the grain at the current prices, at the time of delivery, with interest from that time. In Cole *v.* Ross, 9 B. Mon. 393, it was held, that "a covenant to pay $3,333.33, *payable* in good merchantable pig metal, delivered on the bank at Greenupsburg, at twenty-nine dollars per ton, could not be discharged by the payment of $3,333.33 on the day appointed for the payment." Per *Sampson*, J.: "The expression '*payable* in good merchantable pig metal,' clearly points out the thing which is to be paid; it is not of the same import with the expression *may be paid* in pig metal. The latter, if used, would have implied an election to pay in the thing named or not, as it might suit the convenience of the obligors; the former, in direct and positive language, makes the amount payable in the thing specified, and shows that it was really a contract for pig metal, and not for money, which might be paid by the delivery of the article named; and that the sum mentioned was merely the medium by which the quantity of the thing contracted for was to be ascertained, according to its stipulated value per ton. There is no substantial difference between the writing sued on in this case, and the one upon which the suit was brought, in the case of Mattox *v.* Craig (2 Bibb, 584). In the last-named case, the note was for the payment of 'eighty-nine dollars, to be discharged in good merchantable brick, common brick at four dollars per thousand, and sand brick at five dollars per thousand.' The court decided, that the note was not for the payment of money, but for the payment of brick. It is the opinion of a majority of the court (Judge *Graham*, dissenting), that the note in this case was payable alone in pig metal, and could not be discharged by paying the sum mentioned in money." But there are authorities, of perhaps equal weight, which hold, that a note promising to pay a certain sum, in specific articles at a given price, may be discharged by the delivery of the articles, or by the payment of the sum stated, at the debtor's election; but, after the time fixed for delivery has elapsed, they become obligations for the payment of that sum. Pinney *v.* Gleason, 5 Wend. 393, 5 Cowen, 152, 411; Brooks *v.* Hubbard, 3 Conn. 58; Perry *v.* Smith, 22 Vt. 301. In Pinney *v.* Gleason, 5 Wend. 397, the note was in this form: "For value received, I promise to pay A. B. $79.50 on, &c., in salt, at fourteen shillings per barrel." Per *Walworth*, Ch.: "*Pothier* says, these agreements for paying any thing else in lieu of what is due, are always presumed to be made in favor of the debtor, and therefore he has always a right to pay the thing which is actually due, and the creditor cannot demand any thing else; and he puts the case of a lease of a vineyard at a fixed rent, expressed in the usual terms of commercial currency, but payable in wine. In such a case, he says, the lessee is not obliged to deliver wine, but may pay the rent in money. 2 Ev. Poth. 347, N. 497. Chipman, in his valuable treatise on the law of contracts for the delivery of specific articles, puts the case of a note for $100, payable in wheat, at 75 cents per bushel, and concludes that it comes within the principle referred to by *Pothier*, and that the debtor may pay the $100 in money, *or* in wheat at the price specified. He says, the nature of the contract is this: The creditor agreed to receive wheat instead of money, and as the parties concluded the price of wheat at the time of payment would be 75 cents per bushel, to avoid disputes about the price they fixed it at 75 cents in the contract. If, at the time fixed for payment, wheat be at 50 cents a bushel, the debtor may pay it in wheat at the rate of 75 cents. That, if the parties had intended the risk in the rise and fall of the wheat should be equal with both, the contract would have been simply for the payment of a certain number of bushels. Chip. on Con. 35. This construction of the contract appears to be rational, and is probably in accordance with the practice of those parts of the country where these contracts are most frequently

(*c*) Brooks *v.* Hubbard, 3 Conn. 60 per *Hosmer*, C. J.; Mettler *v.* Moore, 1 Blackf. 342.

SECTION IX.

OF NOMINAL DAMAGES.

As damages are compensation for some actual injury sustained, it might seem, that where a wrong was done, but no actual injury sustained, there could be no action for damages, for there is nothing which requires compensation. It would appear to be, in the language of the law, *injuria sine damno.* The two phrases used in reference to this matter are, *injuria sine damno*, and *damnum absque injuria.* By the first is meant, a wrong done without producing what the law recognizes as *damnum*, or damage in the legal sense of the word. By the second phrase is meant, that injurious consequences have ensued for which the law would make compensation, were it not that the act which caused them was no breach of the law. Thus, it has been said, in reference to a claim of a land-holder for damages caused by a bridge not built upon his premises, that when an act authorized by law gives rise to damages, it is *damnum absque injuria.* (*d*) There are ancient and strong authorities for the rule, that no action for damages will lie, unless an actual injury is either sustained, or is inevitable. (*e*) But there is also high authority, and, in our view, decisive authority, for the assertion, that every injury (meaning thereby a breach of law or a violation

made. The language is certainly not the best which could be used to express such an intent; and probably, if the contract were drawn by a lawyer he would put it in the alternative, giving the debtor the option, in express term, to pay the debt in money, or in wheat, at the fixed rate per bushel. But certainly if the intention of the parties was, that a certain number of bushels of wheat should be absolutely delivered in payment, a lawyer would draw the note for so many bushels of wheat in direct terms." Where notes are given for a specified sum, payable in bank-notes or other choses in action, the measure of damages has been held to be the value of such paper at the time the notes become due. Smith *v.* Dunlap, 12 Ill 184; Clay *v.* Huston, 1 Bibb, 461; Anderson *v.* Ewing, 3 Litt. 245; Phelps *v.* Riley, 3 Conn. 266; Coldren *v.* Miller, 1 Blackf. 296; Van Vleet *v.* Adair, 1 id. 346; Gordon *v.* Parker, 2 Smedes & M. 485; Hixon *v.* Hixon, 7 Humph. 33; Robinson *v.* Noble, 8 Pet. 181.

(*d*) Barbin *v.* Police Jury, 15 La. An. 544.

(*e*) 19 H. 6, 44; Waterer *v.* Freeman, Hob. 267 *a*, per *Hobart*, C. J.; Ashby *v.* White, 2 Ld. Raym. 938, 1 Smith, Ld. Cas. 105, per Curiam, Lord *Holt*, dissenting.

of the right of the plaintiff), imports a damage. (*f*) This injury sometimes consists in the denial of a right, or of property, which is implied by the wrongful act, and not in any consequences which have yet flowed, or can be immediately apprehended from it. And it often happens that an action is brought, sounding only in damages, but intended merely to ascertain and establish a right, without any thought of compensation. For this purpose, any verdict and judgment, for the smallest sum, is as effectual in law as if for a larger. And it is now the established practice in England and in this country, to give a plaintiff damages if he succeeds in proving that the defendant has broken his contract with him, or has trespassed upon his property, or in any way invaded his rights. But if no actual injury has been sustained beyond that which the verdict and judgment will themselves correct, and the case does not call for exemplary damages, the jury would then be directed to give nominal damages; that is, a sum of insignificant value, but called damages. (*g*)

(*f*) Ashby *v.* White, 2 Ld. Raym. 938, 955, 1 Salk. 19, 1 Smith's Ld. Cases, 105, per Lord *Holt;* Williams *v.* Mostyn, 4 M. & W. 145, 153, per *Parke*, B.; Mellor *v.* Spateman, 1 Wms. Saund. 346 *a*, note 2. In Webb *v.* Portland Manuf. Co. 3 Sumner, 189, 192, *Story*, J., said: "I can very well understand, that no action lies in a case, where there is *damnum absque injuria*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can be correctly said, in a legal sense, that an action will not lie, even in a case of wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it, and if no other damage is established, the party injured is entitled to a verdict for nominal damages. . . . . So long ago as the great case of Ashby *v.* White (2 Ld. Raym. 938, 6 Mod. 45, Holt, 524), the objection was put forth by some of the judges, and was answered by Lord *Holt*, with his usual ability and clear learning; and his judgment was supported by the House of Lords, and that of his brethren overturned." By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed. [London: Saunders and Benning, 1837.] In this last printed opinion (p. 14), Ld. *Holt* says: "It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage, in the nature of it."

(*g*) Thus the owner of a several fishery recovered nominal damages of the defendant, in an action of trespass, for fishing in it, although no fish were taken. Patrick *v.* Greenway, 1 Saund. 346, *b*. So nominal damages may be recovered for an unlawful flowing of the plaintiff's land, although no actual damage is done. Chapman *v.* Thames Manuf. Co. 13 Conn. 269; Whipple *v.* Chamberlain Manuf. Co. 2 Story, 661; Pastorius *v.* Fisher, 1 Rawle, 27; Ripka *v.* Sergeant, 7 Watts & S. 9. So they may be recovered for the diversion of a watercourse, without proof of actual damage. Webb *v.* Portland Manuf. Co. 3 Sumner, 189; Plumleigh *v.* Dawson, 1 Gilman, 544; Dickinson *v.* Grand Junction Canal Co. 7 Exch. 282, 9 Eng. L. & Eq. 513. And

Thus, in respect to easements, or a continuing disregard of a right of any kind, it is usual, at least in England, to give, in the first action, little more than nominal damages, because the judgment determines the right; and if the defendant persists in his wrongdoing, the plaintiff may bring successive actions, until repeated and exemplary damages compel him to desist from his wrong. (*h*)

Cases of this class have sometimes been decided, on the ground that nominal damages may be recovered for only probable, or even possible damages. (*i*) And sometimes a jury uses the same means of expressing its opinion that the plaintiff has failed *substantially*, although he has succeeded *formally*. As when in slander or assault and battery, the jury find for the plaintiff, but assess damages at a few cents. (*j*)

see Appleton *v.* Fullerton, 1 Gray, 186. The principle upon which these cases rest, is thus stated by Sergeant *Williams*, Mellor *v.* Spateman, 1 Saund. 346, *b*, note (*b*): "Wherever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific injury."

(*h*) Battishill *v.* Reed, 18 C. B. 696.

(*i*) Wells *v.* Watling, 2 W. Bl. 1233; Weller *v.* Baker (the case of the Tunbridge Well-Dippers), 2 Wilson, 414; Allaire *v.* Whitney, 1 Hill, 484. Generally, in an action for a breach of a contract, the breach, but no actual damage, being proved, nominal damages will be awarded. Boorman *v.* Brown, 3 Q B. 515, 11 Clark & F. 1; Marzetti *v.* Williams, 1 B. & Ad. 415. So, if an agent violate instructions, although no actual damage be shown. Frothingham *v.* Everton, 12 N. H. 239; Blot *v.* Boiceau, 3 Comst. 78, 84. So if a sheriff neglect his duty, although no actual damage arise. Laflin *v.* Willard, 16 Pick. 64; Glezen *v.* Rood, 2 Met. 490; Bruce *v.* Pettengill, 12 N. H. 341. The Supreme Court of Vermont seems to have gone very far in refusing to sustain an action of trespass for the taking of personal property. In Paul *v.* Slason, 22 Vt. 231, the defendant, a sheriff, attached hay, belonging to the plaintiff, and in removing it, used the plaintiff's pitchfork. For the taking of this, among other things, the action of trespass was brought. The court below "charged the jury, that if they found that it was merely used for a portion of a day in removing the plaintiff's property, thus attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the use, they were not bound to give the plaintiff damages for such use." This charge was sustained, and *Poland*, J., in delivering the opinion of the court, said: "It is true, that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property, and gives nominal damages. This goes upon the ground, that either some damage is the *probable* result of the defendant's act, or that his act would have effect to injure the other's *right*, and would be evidence in future in favor of the wrongdoer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done; because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's right, for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage on account of the unlawful intent. But it is believed that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right or possession, is shown, and when not only all *probable*, but all *possible* damage is expressly disproved."

(*j*) Where the plaintiff had destroyed her own character by her dissolute con-

SECTION X.

OF DAMAGES IN REAL ACTIONS.

Thus far we have treated only of damages for the breach of personal contracts; or for personal torts. In real actions, strictly speaking, damages were not demanded or given at common law; (*k*) one writ, that of *estrepement*, after judgment, gave compensation in some cases; (*l*) but damages were given by early statutes, and properly belong to all mixed actions, and to personal actions relating to land. (*m*) In ejectment they are in general nominal only; (*n*) and a subsequent action of trespass is brought for the mesne profits. (*o*) But where the plaintiff has a title and estate which would maintain his action, and the estate terminates or the title expires while the action is pending, actual damages may be recovered, including mesne profits. (*p*) Sometimes trespass for mesne profits is brought, not only for them, but to try the title to the estate. (*q*)

The question, what damages may be recovered, is not only determined in this as in other cases by the principle of compensation, but this principle is carried very far. Thus, the rent of the land is barely *primâ facie* evidence of its annual value or

duct, the jury, in an action of slander, may give nominal damages. Flint *v.* Clark, 13 Conn. 361.

(*k*) Sayer on Damages, p. 5; Stearns on Real Actions, 390.

(*l*) 2 Inst. 329; 3 Bl. Com. 225; Sayer on Damages, 34.

(*m*) 20 Hen. 3, c. 3; 52 Hen. 3, c. 16; 6 Ed. 1, c. 1; Pilford's Case, 10 Co. 115; Stearns on Real Actions, 389 *et seq.*

(*n*) Van Alen *v.* Rogers, 1 Johns. Cas. 281; Harvey *v.* Snow, 1 Yeates, 156.

(*o*) Van Alen *v.* Rogers, 1 Johns. Cas. 281; Adams on Ejectments, 328. In some States mesne profits are recovered in the action of ejectment. Boyd *v.* Cowan, 4 Dall. 138; Battin *v.* Bigelow, Pet. C. C. 452; Starr *v.* Pease, 8 Conn. 541; Denn *v.* Chubb, 1 Coxe, 466; Beach *v.* Beach, 20 Vt. 83; Edgerton *v.* Clark, id. 264. But the recovery of mesne profits in the action of ejectment, has been held to be no bar to a subsequent action for trespass for wanton injuries. Walker *v.* Hitchcock, 19 Vt. 634. See Gill *v.* Cole, 1 Harris & J. 403.

(*p*) Thurstout *v.* Grey, 2 Stra. 1056; Robinson *v.* Campbell, 3 Wheat. 212; Wilkes *v.* Lion, 2 Cowen, 333; Brown *v.* Galloway, Pet. C. C. 291, 299; Alexander *v.* Herr, 11 Penn. St. 537. See Stockdale *v.* Young, 3 Strobh. 501.

(*q*) Bullock *v.* Wilson, 3 Porter, 382; Sumpter *v.* Lehie, 1 Consist. R. 102. In Massachusetts, both the land and the mesne profits are recovered by a writ of entry. Rev. St. ch. 101; Washington Bank *v.* Brown, 2 Met. 293.

profit, and the jury may exceed it very much, indeed, to whatever extent is necessary to give the plaintiff adequate compensation. (*r*) The damages have been held to be "as uncertain as in an action of assault;" and because the action is in fact as well as form for a tort, bankruptcy is no sufficient plea in defence. (*s*) So, to make up the value, the rents have been allowed, and interest upon them, (*t*) and the costs of the litigation by which the title was established. (*u*)

The common law, unlike the Roman law and the modern codes founded upon it, gives to a *bona fide* holder without title, no claim for his improvements against the true owner. If he loses the land, he loses with it all the improvements which have become fixed to the realty. (*v*) In many of our States the civil law principle has been adopted, and statutory provisions made, by which such defendant, being ousted by a better title, may recover the value of his improvements, as assessed by a jury of the vicinage (*w*) Besides this, however, it has been held in this country, that a holder of land in entire good faith, if ousted by a better title of which he was ignorant, and afterwards called upon to refund the mesne profits, may set off his improvements against the mesne profits. (*x*) But such improvements must be in their nature permanently beneficial to the estate. (*y*) In that case a Court of Equity will sustain, against the actual owner, after recovery of the premises, a bill brought by a *bona fide* possessor, for the value of his improvement. (*z*)

(*r*) Goodtitle *v.* Tombs, 3 Wilson, 118; Dewey *v.* Osborn, 4 Cowen, 329; Draxel *v.* Man, 2 Penn. St. 271, 276; Adams on Eject. 328.

(*s*) Goodtitle *v.* North, Doug. 584, per *Buller*, J.

(*t*) Jackson *v.* Wood, 24 Wend. 443.

(*u*) Astin *v.* Parkin, 2 Burr. 665. The rule appears to be, that where the costs have been taxed in the ejectment suit, nothing more than those can be recovered. Doe *v.* Davis, 1 Esp. 358; Doe *v.* Hare, 4 Tyrw. 29. See *ante*, page 164, n. (*j*). But where they have not been taxed, as in case of a judgment by default, or where there is a writ of error, evidence may be introduced to show their amount. Nowell *v.* Roake, 7 B. & C. 404; Brooke *v.* Bridges, 7 J. B. Moore, 471; Doe *v.* Huddart, 5 Tyrw. 846, 2 Cromp., M. & R. 316; Baron *v.* Abeel, 3 Johns. 481. See Alexander *v.* Herr, 11 Penn. St. 537.

(*v*) Powell *v.* M. & B. Manuf. Co. 3 Mason, 369; 2 Kent's Com. 334–338.

(*w*) Mass. R. St. ch. 101; Ohio R. St. ch. 77; N. H. R. St. ch. 190; 2 Kent's Com. 335, 336; Lamar *v.* Minter, 13 Ala. 31; Bailey *v.* Hastings, 15 N. H. 525.

(*x*) Murray *v.* Gouverneur, 2 Johns. Cas. 438, 441; Jackson *v.* Loomis, 4 Cowen, 168; Green *v.* Biddle, 8 Wheat. 1, 81, citing Coulter's Case, 5 Rep. 30; Hylton *v.* Brown, 2 Wash. C. C. 165; Dowd *v.* Faucett, 4 Dev. 92, 95; Beverly *v.* Burke, 9 Ga. 440; Burrows *v.* Pierce, 6 La. An. 303, 308.

(*y*) Worthington *v.* Young, 8 Ohio, 401; Matthews *v.* Davis, 6 Humph. 324.

(*z*) Bright *v.* Boyd, 1 Story, 494, 2 id.

A dowress, from whom land is withheld, may recover damages. (*a*) But when the suit is brought for land upon which valuable improvements have been made, by building houses, for instance, either by the alienee of the husband or by the heir, it is not positively settled whether she has damages to cover her claim to dower in these improvements, or must be limited to her dower in the land, as the purchaser took, or the heir inherited it. There are certainly strong reasons, if not conclusive authority, in favor of the principles applied to this question in some of our courts; namely, that where the heir adds improvements to the estate, the widow shall have her dower in them; but not in the im-

605; Herring *v.* Pollard, 4 Humph. 362; Matthews *v.* Davis, 6 id. 324; Martin *v.* Atkinson, 7 Ga. 228; Bryant *v.* Hambrick, 9 Ga. 133; 2 Story's Eq. Juris. §§ 799 *b*, 1237, 1238. But see Putnam *v.* Ritchie, 6 Paige, 390, 403.

(*a*) The law on this subject, as it stood under the statute of Merton, was clearly stated by *Booth*, J., in Layton *v.* Butler, 4 Harring. Del. 507, 509. Dower *unde nihil habet* is a real action, in the nature of a writ of right; and therefore, by the common law, no damages were recoverable by the wife for its detention. By the statute of Merton it was enacted, that where widows were efforced of their dower, and cannot have it *without plea*, they who efforced them of their dower, of the lands *whereof their husbands died seised*, shall, upon the recovery thereof by such widows, yield them damages, that is to say: the value of the whole dower (namely, the one third of the annual profits of the land), from the death of the husband unto the day that the widow, by the judgment of the court, has recovered seisin of her dower. Where the husband has aliened the land, no damages can be recovered by the widow against the alienee, without a demand of dower and a refusal; and then only from the time of making the demand. Where the husband dies seised of the inheritance, as the possession immediately devolves on the heir, damages may be recovered against him from the time of the husband's death. But according to Co. Litt. 32, b., the heir may save himself from damages, if he comes into court upon the summons the first day, and pleads that he has always been ready and yet is ready to render dower, and prays that she may not have damages; in which case, if the wife has not requested her dower, she loses her damages. But if to the plea she replies a demand of her dower, and issue is thereupon taken and found for her, she recovers damages, from the death of her husband. If the heir succeeds on the issue, he is saved from damages from the time of the husband's death; but still the widow recovers damages from the teste of the original writ, which in law is considered as a demand. So, too, in the case of the husband's alienee, damages are given from the time of the suing out of the writ, although no demand was in fact made. It seems necessary, therefore, to entitle the widow to damages, either against the alienee or the heir, that she should make a demand of her dower previous to bringing her action of dower *unde nihil habet*. By the damages in this action are meant the one-third of the annual profits of the land, beyond all reprises (that is, after deducting land-taxes, repairs, &c.), and also, such damages as the wife has sustained by the detention of her dower, which, in the inquisition taken upon a writ of inquiry, are usually assessed severally; although it is said, damages may be given generally, without finding the value of the land." See Watson *v.* Watson, 10 C. B. 3, 1 Eng. L. & Eq. 371. In many States the damages for the detention of dower are regulated by statutes. N. Y. Rev. St. vol. 2, pt. 2, tit. 3, p. 151; Mass. Rev. St. ch. 102; 4 Kent, Com. 65. It seems that in some of the States the statute of Merton is held not to be in force, and no damages are given. Heyward *v.* Cuthbert, 1 McCord, 386; Bank of U. S. *v.* Dunseth, 10 Ohio, 18.

provements made by a purchaser; (*b*) but that she shall have, against a purchaser, her dower in the increased value of the land, caused by the general growth and prosperity of the country. (*c*)

Where an action is brought for wrongful interference with real estate, or with the occupation or enjoyment of it, and the action not only sounds in tort, but is for actual injury, there it seems quite settled, and illustrated by a variety of cases in this country, that compensation may be recovered by way of damages for all the direct and natural consequences of the injury. (*d*)

(*b*) It is well settled that a widow is entitled to dower out of any improvements that may have been made by the heir previous to the assignment. Co. Litt. 32, a; 1 Roper on Husband and Wife, 246, 347; Catlin *v.* Ware, 9 Mass. 218; Powell *v.* M. & B. Manuf. Co. 3 Mason, 346, 365; but not out of any improvements made by the alienee of her deceased husband. Gore *v.* Brazier, 3 Mass. 544; Ayer *v.* Spring, 9 id. 8; 10 id. 80; Stearns *v.* Swift, 8 Pick. 532; Wooldridge *v.* Wilkins, 3 How. Miss. 360; Humphrey *v.* Phinney, 2 Johns. 484; Wilson *v.* Oatman, 2 Blackf. 223; Mahony *v.* Young, 3 Dana, 588; Leggett *v.* Steele, 4 Wash. C. C. 305; Barney *v.* Frowner, 9 Ala. 901; 1 Roper on Husband and Wife, 346. If the land is impaired in value, between the time of the husband's death and the assignment by the heir, the widow is only entitled to dower out of its value at the time of the assignment. Co. Litt. 32, a; Hale *v.* James, 6 Johns. Ch. 258, 260, per Chancellor *Kent;* Powell *v.* M. & B. Man. Co. 3 Mason, 347, 368, per *Story*, J. But if the alienee has impaired the value of the premises, the widow seems to be entitled to dower, according to the value at the time of the alienation. Hale *v.* James, 6 Johns. Ch. 258.

(*c*) This distinction between the increase in value arising from extrinsic causes, and that arising from improvements made by the alienee of the husband, appears to have been first taken by *Parsons*, C. J., in Gore *v.* Brazier, 3 Mass. 523, 544. It was adopted in Thompson *v.* Marrow, 5 S. & R. 289, and, after much consideration, by *Story*, J., in Powell *v.* M. & B. Manuf. Co. 3 Mason, 347, 365, and is sanctioned by Chancellor *Kent*, 4 Kent, Com. 68. See also, Shirtz *v* Shirtz, 5 Watts, 255; Dunseth *v.* The Bank of U. S. 6 Ohio, 76. But it has been held otherwise in Tod *v.* Baylor, 4 Leigh, 498, and in New York, under a statute. Walker *v.* Schuyler, 10 Wend. 480; Humphrey *v.* Phinney, 2 Johns. 484; Dorchester *v.* Coventry, 11 Johns. 510; Shaw *v.* White, 13 Johns. 179.

(*d*) The general principles, in regard to the immediate and remote consequences of an unlawful act, apply to this class of cases. See *ante*, p. 181, note (*w*). In White *v.* Moseley, 8 Pick. 356, in an action of trespass *quare clausum fregit*, for entering the plaintiff's close and destroying a mill-dam, the plaintiff recovered for "the interruption to the use of the mill, and the diminution of the plaintiff's profits on that account." See Dickinson *v.* Boyle, 17 Pick. 78. In Barnum *v.* Vandusen, 16 Conn. 200, where the defendant's sheep entered upon the plaintiff's land and communicated an infectious disease to his sheep, it was *held*, that the plaintiff was entitled to recover, in an action of trespass, for the loss of the sheep, and for the trouble and expense in taking care of them. See Anderson *v.* Buckton, Stra. 192. In Johnson *v.* Courts, 3 Harris & McH. 510, where the defendant entered upon the plaintiff's land and with clubs drove away eight negroes, it was *held*, in action of trespass *quare clausum fregit*, that the plaintiff could recover for injuries to his crops, consequent upon the driving away of his negroes. In an action for entering upon the plaintiff's close, damages may be recovered for debauching the plaintiff's daughter and servant. See Bennett *v.* Allcott, 2 T R. 166; Ream *v.* Rank, 3 S. & R. 215. See Wat-

If the action be brought on the common covenants of a deed, the rules in respect to compensation seem to differ, according as it is one or another of these covenants which has been broken. The covenant that the grantor is lawfully seised, and that he has good right to convey (which has been held the same with the covenant of seisin), (*e*) and that the premises are free from incumbrances, are broken as soon as the deed is executed, if the grantor has no seisin, or the land be incumbered. (*f*) And if an action is brought on the covenant, that the grantor is lawfully seised, although the plaintiff may prevail, by proving the actual breach of the covenant, as that the grantor had no seisin, he will have, it is said, as damages, only the price he has paid, and interest; on the ground that he has lost no land, because, if this covenant were broken when the deed was given, it follows that no land ever passed to him. (*g*) And, if it is made to appear that the plaintiff has lost less than the value of the land, as by a purchase at a low price of an outstanding title, he will recover less. (*h*) If the grantor has acquired a title which will enure to the grantee by way of estoppel, the damages will be only nominal. (*i*) But it has been also held, that a release of land without warranty, by the grantee to a third person, will not prevent the grantee's recovery of full damages. (*j*)

The covenants that the grantee shall have quiet enjoyment, and that the grantor will warrant and defend against all lawful

son *v.* Pittsburg & Cleveland, R. R. Co. 37 Penn. St. 469, as to liability of a railroad company for consequential damages to land by the construction of its road, where the charter makes no provision.

(*e*) Willard *v.* Twitchell, 1 N. H. 177, 498; Rickert *v.* Snyder, 9 Wend. 416, 421. But the covenants are not in all respects synonymous, as a party may have a good right to convey, and yet not be seised of a legal estate. Rawle on Covenants for Title, 127.

(*f*) See *ante*, vol. 1, p. 231.

(*g*) Staats *v.* Ten Eyck, 3 Caines, 111; Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 id. 433; Caswell *v.* Wendell, 4 id. 108; Smith *v.* Strong, 14 Pick. 128; Stubbs *v.* Page, 2 Greenl. 378; Mitchell *v.* Hazen, 4 Conn. 495; Weiting *v.* Nissley, 13 Penn. St. 650, 655; Seamore *v.* Harlan, 3 Dana, 415; Martin *v.* Long, 3 Mo. 391; Clark *v.* Parr, 14 Ohio, 118. See also, Parker *v.* Brown, 15 N. H. 176; Cox *v.* Strode, 2 Bibb, 273. In an action for the breach of this covenant, damages cannot be recovered for improvements, or the increased value of the land. Staats *v.* Ten Eyck, 3 Caines, 111; Pitcher *v.* Livingston, 4 Johns 1; Bennet *v.* Jenkins, 13 Johns. 50; Bender *v.* Fromberger, 4 Dall. 436; Weiting *v.* Nissley, 13 Penn. St. 650.

(*h*) Tanner *v.* Livingston, 12 Wend. 83; Spring *v.* Chase, 22 Me. 505; Leffingwell *v.* Elliott, 8 Pick. 455, 10 id. 204; Loomis *v.* Bedel, 11 N. H. 74, 87.

(*i*) Baxter *v.* Bradbury, 20 Me. 260.

(*j*) Cornell *v.* Jackson, 3 Cush. 506.

claims, are, in general, broken only by actual ouster, (*k*) and then such damages will be recovered, according to the rule laid down in one of the earliest cases on this subject, as shall give to the injured party full and adequate compensation. (*l*)

But if we suppose a case where land is conveyed with warranty, the grantor and grantee both believing the title to be good, and there is no taint or suspicion of fraud, and the land rises greatly in value, either by the increased worth of real estate in that vicinity, or by expensive improvements made by the grantee, and then the grantee is ousted and comes on the warranty against the grantor, the question arises, what is the compensation to which the plaintiff is entitled. It is obvious that an error has been made by which some innocent party must lose much; and it cannot be said that this error is to be imputed as a wilful fault to one party more than to the other. If the covenantor is bound to make good the value of all that the grantee loses, "no man," says Kent, "could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin." (*m*) But if not, the innocent grantee may lose by a failure of a title, for the warranty of which he had paid a valuable consideration, the greater part of the value of his estate. In some States the value of the estate at the time of the conveyance is the measure of damages; and where this value determines in the assessment of damages, it is itself determined, generally, at least, by the amount of the consideration paid, with interest. But if mesne profits have been received by the grantee, they will, in general, be held equivalent to the interest; and then no interest will be allowed to the grantee, or only that which is commensurate with his liability for the mesne profits to the holder of the paramount title; and therefore he can recover interest only for six years. (*n*) In some

(*k*) Rawle on Covenants for Title, 182, 339.

(*l*) Gray *v.* Briscoe, Noy, 142; Pincombe *v.* Rudge, Yelv. 139, Hobart, 3, and *note*, in Williams's edition.

(*m*) Staats *v.* Ten Eyck, 3 Caines, 114, 115.

(*n*) Where the value of the land at the time of the conveyance is taken into account in assessing damages, that value is in general determined by the amount of the consideration paid, and interest is allowed on that sum; but if mesne profits have been received by the grantee, those will be held equivalent to the interest, and in that case, the allowance of interest to the grantee will only be commensurate with his liability for the mesne profits to

States the value of the land at the time of the eviction, is the measure of damages. (*o*) There seem to be intimations of a distinction between the increased worth by a rise in the market value of the land, which has cost the grantee nothing, and that increase caused by his expenditure in affixing valuable buildings or other improvements to the land. And there are some reasons in favor of allowing to the grantee, as damages, the latter kind of increase, but not the former. (*p*) It has also been held, that the purchase-money, with interest, forms the absolute measure of the damages. (*q*) If the failure of title

the holder of the title paramount, that is, he can, in general, recover interest for six years only. Bennet *v.* Jenkins, 13 Johns. 50; Staats *v.* Ten Eyck, 3 Caines, 111; Baxter *v.* Ryerss, 13 Barb. 267; Clark *v.* Parr, 14 Ohio, 118. The amount of the consideration-money with interest has been held to be the measure of damages, in New York; Pitcher *v.* Livingston, 4 Johns. 1; Bennet *v.* Jenkins, 13 id. 50; Kinney *v.* Watts, 14 Wend. 38; Kelly *v.* Dutch Church of Schenectady, 2 Hill, 105, 115; Baxter *v.* Ryerss, 13 Barb. 267; — in Pennsylvania; Brown *v.* Dickerson, 12 Penn. St. 372; Bender *v.* Fromberger, 4 Dall. 436, 441; King *v.* Pyle, 8 S. & R. 166; — in New Jersey; Holmes *v.* Sinnickson, 3 Green, 313; Stewart *v.* Drake, 4 Halst. 139, 142; — in Virginia; Stout *v.* Jackson, 2 Rand. 132; Threlkeld *v.* Fitzhugh, 2 Leigh, 451, 463; Jackson *v.* Turner, 5 id. 119; Haffey *v.* Birchetts, 11 id. 83, 88; *contra*, Mills *v.* Bell, 3 Call, 320; — in South Carolina; Furman *v.* Elmore, 2 Nott & McC. 189; Wallace *v.* Talbot, 1 McCord, 466, 468; Pearson *v.* Davis, 1 McMullan, 37; *Contra*, Liber *v.* Parsons, 1 Bay, 19; Witherspoon *v* Anderson, 3 Desaus. 245; — in North Carolina; Phillips *v.* Smith, 1 Car. Law Repos. 475; Wilson *v.* Forbes, 2 Dev. 30; — in Ohio; King *v.* Kerr, 5 Ohio, 154; Foote *v.* Burnet, 10 id. 317; Clark *v.* Parr, 14 id. 118; — in Georgia; Davis *v.* Smith, 5 Ga. 274; — in Kentucky; Cox *v.* Strode, 2 Bibb, 273; Hanson *v.* Buckner, 4 Dana, 251; Pence *v.* Duvall, 9 B. Mon. 48; In Tennessee; Shaw *v.* Wilkins, 8 Humph. 647, 651, per *McKinney*, J.

(*o*) This is the rule adopted in Massachusetts; Gore *v.* Brazier, 3 Mass. 523; Bigelow *v.* Jones, 4 id. 512; Norton *v.* Babcock, 2 Met. 510; White *v.* Whitney, 3 id. 81, 89; — in Maine; Cushman *v.* Blanchard, 2 Greenl. 266, 268; Swett *v.* Patrick, 3 Fairf. 9; Hardy *v.* Nelson, 27 Me. 525; Elder *v.* True, 32 id. 109; — in Connecticut; Horsford *v.* Wright, Kirby, 3; Stirling *v.* Peet, 14 Conn. 245; — in Vermont; Drury *v.* Shumway, 1 D. Chip. 111; Parke *v.* Bates, 12 Vt. 387. The question, although raised, is undecided in New Hampshire and Indiana. Loomis *v.* Bedel, 11 N. H. 74, 87; Blackwell *v.* Justices of Lawrence Co. 2 Blackf. 143, 147. See Rawle on Cov. for Title, p. 319 *et seq.* (2d edition); 4 Kent, Com. 474–480; 2 Greenl. Ev. § 264. In Louisiana the question has been much discussed, and different rules have prevailed, under the codes of 1808 and 1825. See Bissell *v.* Erwin, 13 La. 147; Edwards *v.* Martin, 19 id. 294; Morris *v.* Abat, 9 id. 552; 13 id. 148, *note.* The question was thoroughly discussed in the late case of Burrows *v.* Peirce, 6 La. An. 297, and it was held, *Rost*, J., dissenting, that the increased value at the time of eviction ought not to be recovered. The grantee is also entitled to recover the costs of the suit by which he has been evicted. Pitcher *v.* Livingston, 4 Johns. 1; Baxter *v.* Ryerss, 13 Barb. 267; Holmes *v.* Sinnickson, 3 Green (N. J.), 313; Cushman *v.* Blanchard, 2 Greenl. 266; Swett *v.* Patrick, 3 Fairf. 9.

(*p*) Staats *v.* Ten Eyck, 3 Caines, 117; Pitcher *v.* Livingston 4 Johns. 13, per *Spencer*, J.; Bender *v.* Fromberger, 4 Dall. 442; Martin *v.* Atkinson, 7 Ga. 238. See *ante*, p. 223, note (*c*). But there seems to be no adjudication in favor of applying the distinction referred to in the text to this class of cases.

(*q*) In most of the cases cited *supra*, note (*n*), the consideration-money with interest and the costs were held to be the

extend only to a part of the land, the question has been raised whether the damages should be recovered for the whole land, or for part only, and then whether the proportion which the *quantity* of the land lost by the failure bears to the whole, should be considered, or the proportion which its *value* bears; but the principle of compensation prevails, and it may be considered as established, that the part only of the land of which the title has failed, is to be paid for, (*r*) and that in proportion to its value and not its mere quantity. (*s*)

measure of damages, but in Threlkeld *v.* Fitzhugh, 2 Leigh, 451, it was suggested, that in some cases it might be shown that the actual value of the land was greater than the price paid. See 4 Kent, Com. 476.

(*r*) In Morris *v.* Phelps, 5 Johns. 49, the title to a part of the premises failed, and it was urged that the plaintiff ought to recover the whole consideration-money, but the court laid down the rule in the text. *Kent*, C J., said: "This is an old and well-settled rule of damages; thus, in the case of Beauchamp *v.* Damory, Year-Book, 29 Ed. 3, 4, it was held, by *Hill*, J., that if one be bound to warranty, he warrants the entirety, but he shall not render in value but for that which was lost. In 15 Ed. 4, 3 (and which case is cited in Bustard's case, 4 Co. 121), the same principle was admitted, and it was declared and agreed to by the court, that in exchange, where a want of title existed as to part, the party evicted might enter as for a condition broken, if he chose; but if he sued to recover in value, he should recover only according to the value of the part lost. Though the condition be entire, and extends to all, yet it was said that the warranty upon the exchange might severally extend to part. So in the case of Gray *v.* Briscoe, Noy, 142, B. covenanted, that he was seised of Blackacre in fee, whereas in truth it was copyhold land in fee, according to the custom; and the court said, that the jury should give damages according to the difference in value between fee-simple land and copyhold land." See also, Guthrie *v.* Pugsley, 12 Johns. 126. In Johnson *v.* Nyce, 17 Ohio, 66, it was said, that in an action on a covenant of warranty, broken by the assignment of dower, damages would be given to the extent that the value of the estate is diminished by carving out the life-estate, taking one third of the consideration-money to be the value of one third of the fee-simple interest. See Rickert *v.* Snyder, 9 Wend. 416; Michael *v.* Mills, 17 Ohio, 601; Gray *v.* Briscoe, Noy, 142; Rawle on Coven. for Title 2d ed. p. 113, *et seq.*

(*s*) In Morris *v.* Phelps, 5 Johns. 49, 56, *Kent*, C. J., in delivering the opinion of the court, said: "Another question in this case is, whether the defendant ought not to have been permitted to show that the lands, in the deed of 1795, of which there was a failure of title, were of inferior quality to the other lands conveyed by the same deed. This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water with expensive improvements upon it, with ten acres of adjoining barren land, was sold for 10,000 dollars, and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land, would it not be unjust that the grantee should be limited in damages, under his covenants, to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated; and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of the extreme injustice, if he was obliged to refund nine tenths of the consideration-money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved." See also, Cornell *v.* Jackson, 3 Cush. 509; Dickens *v.* Shepperd, 3 Murph. 526. In King *v.* Pyle, 8 S. & R. 166, this rule was applied where the sale was fraudulent, but the court did not decide what would be the rule if the sale were *fair*. There are cases which

If the action is brought upon the covenant that the land is free from incumbrances, it will be necessary to consider the nature and effect of the incumbrances. If they consist of mortgages or attachments, or other liens of like kind, it seems to be well settled that the grantee may pay off these incumbrances, and may then recover all that he necessarily expended in this way, from the grantor; (*t*) and may even recover the amount of money paid by him to remove these incumbrances, after the action has been commenced. (*u*)

But, if he does not discharge the incumbrances, and brings his action before ouster or any actual injury springing from them, although the action is sustainable, because the existence of the incumbrances work a breach of the covenant, yet he can recover only nominal damages. (*v*) Still, if the incumbrances are of a permanent nature, such as interfere with the actual enjoyment of the estate, and such that the grantee cannot remove them by his own act, as for instance, a lease of the whole or a part of the premises, then it would seem that actual compensation may be recovered, and that there is no rule which should prevent this from being full and adequate (*w*) If the

hold that the average value is to be recovered for the part to which the title has failed. Nelson *v.* Matthews, 2 Hen. & M. 164; Nelson *v.* Carrington, 4 Munf. 332.

(*t*) Delavergne *v.* Norris, 7 Johns. 358; Hall *v.* Dean, 13 id. 105; Stanard *v.* Eldridge, 16 id. 254; Prescott *v.* Trueman, 4 Mass. 627; Henderson *v.* Henderson, 13 Mo. 151.

(*u*) Leffingwell *v.* Elliott, 10 Pick. 204; Brooks *v.* Moody, 20 id. 474; Kelly *v.* Low, 18 Me. 244; Pomeroy *v.* Burnett, 8 Blackf. 143; together with reasonable expenses incurred in extinguishing the incumbrance, exclusive of counsel fees. Leffingwell *v.* Elliott. But the grantee cannot recover beyond the amount of the consideration-money and interest. Dimmick *v.* Lockwood, 10 Wend. 142; Foote *v.* Burnet, 10 Ohio, 317; 4 Kent, Com. 476. But in those States in which, in action for a breach of the covenant of warranty, the measure of damages is held to be the value of the estate at the time of eviction, it seems that the grantee may recover what he has paid to extinguish incumbrances, to the extent of the value of the estate at the time of payment. Norton *v.* Babcock, 2 Met. 510; White *v.* Whitney, 3 id. 81; Rawle on Cov. for Title (2d edition), 161; Sedgwick on Dam. 180. In Elder *v.* True, 32 Me. 104, it was held, that where land is incumbered by a mortgage, the grantee may redeem or not at his election, but, if evicted, he may recover the value of the land, including his improvements, even if the value exceed the amount due on the mortgage. But see White *v.* Whitney, 3 Met. 81; Donahoe *v.* Emery, 9 id. 63.

(*v*) Prescott *v.* Trueman, 4 Mass. 627; Wyman *v.* Ballard, 12 id. 304; Tufts *v.* Adams, 8 Pick. 547; Herrick *v.* Moore, 19 Me. 313; Delavergne *v.* Norris, 7 Johns. 358; Hall *v.* Dean, 13 id. 105; Stanard *v.* Eldridge, 16 id. 254; Whisler *v.* Hicks, 5 Blackf. 100; Davis *v.* Lyman, 6 Conn. 254. Payments for the discharge of incumbrances cannot be recovered unless specially alleged. DeForest *v.* Leete, 16 Johns. 122.

(*w*) Prescott *v.* Trueman, 4 Mass. 267, 630; Harlow *v.* Thomas, 15 Pick. 66, 69; Hubbard *v.* Norton, 10 Conn. 422, 435. In Batchelder *v.* Sturgis, 3 Cush. 205,

action is brought on a contract to sell, and against the party who had promised to sell and had failed to do so, many authorities have held that the result may depend upon the cause of the failure. For if the intended vendor was honest, and was prevented from making the sale by causes which he did not foresee, and could not control, then the plaintiff recovers only nominal damages; or, if he has paid the price, the sum with interest, adding perhaps, in both cases, his expenses in investigating the title, or for similar purposes. (x) But if the proposed vendor

Fletcher, J., in giving the opinion of the court, said: "In New York, in the case of Rickert v. Snyder, 9 Wend. 423, it was held, that when the covenant against incumbrances is broken, by reason of an unexpired term, which is the present case, the rule of damages is the annual value of the estate, or the annual interest on the purchase-money. This rule may do justice in some, perhaps in many cases, but this court is not prepared to adopt it as a general rule. . . . The rule is, that for such incumbrances as a covenantee cannot remove, he shall recover a just compensation for the real injury resulting from the incumbrance. Though it seems desirable to have as definite and precise rules, upon the subject of damages, as are practicable, it seems impossible to establish any more precise general rule in this class of cases." If the grantee is permanently kept out of the estate, by reason of the incumbrances, the purchase-money and interest are the measure of damages. Chapel v. Bull, 17 Mass. 213; Jenkins v. Hopkins, 8 Pick. 346; so also, in case of eviction, Waldo v. Long, 7 Johns. 173; Martin v. Atkinson, 7 Ga. 228; Patterson v. Stewart, 6 Watts & S. 527. But see Chapel v. Bull; Jenkins v. Hopkins, and *supra*, p. 224, note (g). In an action on a covenant to pay off incumbrances, the amount of the incumbrances is held the measure of damages. Lethbridge v. Mytton, 2 B. & Ad. 772.

(x) Flureau v. Thornhill, 2 W. Bl. 1078; Walker v. Moore, 10 B. & C. 416; Worthington v. Warrington, 8 C. B. 134; Baldwin v. Munn, 2 Wend. 399; Peters v. McKeon, 4 Denio, 546; Thompson v. Guthrie, 9 Leigh, 101; Combs v. Tarlton, 2 Dana, 464; Allen v. Anderson, 2 Bibb, 415; Stewart v. Noble, 1 Greene (Iowa), 26. See Fletcher v. Button, 6 Barb. 646. This rule appears to be established in England, and generally prevails in this country; but there appears to be some diversity in the reasoning upon which it is based. In England the rule appears to be sustained on the ground that the parties must have contemplated the difficulties attendant upon the conveyance, and hence the plaintiff is allowed to recover the expense of investigating the title, but no other expenses, on the ground that he is not justified in taking any other step until he is sure of a good title. In Flureau v. Thornhill, *Blackstone*, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." In Walker v. Moore the land was not conveyed on account of a defect in the title. The plaintiff had contracted to resell, and demanded damages for the loss of profits on his contracts of resale, for the expense attending those resales, and for the amount for which he was liable to the subcontractors for examining the title, and the expense incurred by himself for the same purpose. He was allowed to recover only his own expense in examining the title. *Parke*, J., said: "It is usual and reasonable, before any expense is incurred, to compare the abstract with the deeds; and without giving any opinion as to the right of the plaintiff to resell before he had obtained a conveyance and actual possession, I think he cannot recover those expenses which he has sustained by reason of his having contracted to resell the premises before he had taken the trouble to ascertain whether the abstract was correct or not." *Bayley*, J., supposed he might have recovered the expense attending the resale, had that contract been entered into after proper investigation. He said: "If it [the abstract] had been examined with the deeds and found correct, the plaintiff might perhaps have been justified in acting upon the faith of having the estate; and if, after that time, he had

was in fault, and either did know, or should have known, that he could not do what he undertook to do, here substantial damages may be given, including compensation for any actual loss, as by the increased value of the land; (*y*) and this has been extended to cases where the vendor acted in good faith, but knew that he had, at the time, no title; as where the vendor offered for sale at public auction, land which he had contracted with a third person to buy from him, and failed to buy, only on account of the inability of that third person to make a conveyance to him. (*z*) In this respect the rule would be distinguished

made a subcontract, I think he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor." The plaintiff, having failed in a bill in equity, brought to enforce specific performance of a contract to sell land, because the defendant could not give title, was not allowed to recover his costs in the equity suit, in an action at law. Malden *v.* Fyson, 11 Q. B. 292. In this country, although nearly the same rule is in some of the States adopted (differing perhaps from the English in the fact that the expense of investigating the title is not allowed), it is based upon the analogy between this class of cases and actions upon covenants for title. As we have seen, in those cases, the measure of damages, where there has been an eviction, is, in most of the States, the amount of the consideration-money, with interest; so in actions upon this class of contracts, the same rule has been adopted. In Baldwin *v.* Munn, *Sutherland*, J., said: "In an action on the covenant against incumbrances in a deed, the plaintiff can recover only the amount paid by him to extinguish the incumbrance; but if he has paid nothing, no matter what the amount of the lien may be, he can recover *nominal damages only*. Delavergne *v.* Norris, 7 Johns. 358; 4 Mass. 627; 13 Johns. 105. If these principles are just, in relation to the covenant of general warranty, and of quiet enjoyment, and against incumbrances, I do not perceive why they are not equally applicable to the covenant to convey, where the covenantor has acted in good faith, and refused to convey because his title has in fact failed. The reasons which are urged with so much force, by C. J. *Kent*, in Staats *v.* Ten Eyck (3 Caines, 111, 115), in favor of the rule of damages adopted in that case, certainly apply with equal force to the case in question." See the other American cases cited above.

(*y*) See authorities cited in the preceding note, and Bitner *v.* Brough, 11 Penn. St. 127; Handley *v.* Chambers, 1 Litt. 358; Blanchard *v.* Ely, 21 Wend. 346, 347, per *Cowen*, J.; Nourse *v.* Barns, 1 T. Raym. 77. So, where the party having title, refuses to convey it; Driggs *v.* Dwight, 17 Wend. 71; Baldwin *v.* Munn, 2 id. 399, 406; or, having title at the time of the agreement, afterwards disables himself from completing it, by selling the land to a third party; Patrick *v.* Marshall, 2 Bibb, 47; Fisher *v.* Kay, 2 id. 434, 440; Wilson *v.* Spencer, 11 Leigh, 261; or, at the time of the agreement, knew he had no title; McConnell *v.* Dunlap, Hardin, 41.

(*z*) Hopkins *v.* Grazebrook, 6 B. & C. 31. See this case cited in Walker *v.* Moore, 10 B. & C. 416, and in Fletcher *v.* Button, 6 Barb. 650. The doctrine of Hopkins *v.* Grazebrook, was affirmed in Robinson *v.* Harman, 1 Exch. 850. *Parke*, B., said: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of Flureau *v.* Thornhill, qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding, that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am

from that applicable to actions for non-sale of chattels where the plaintiff recovers compensation for all actual damages, without any reference to the good or bad faith of the vendor. But the Supreme Court of the United States have refused to adopt this distinction, on the ground that the reason of the rule as to chattels applies with equal force to bargains respecting land; this reason being, that if a vendor, under such circumstances, could escape with nominal damages, there would be danger that he might refuse to complete the sale for the purpose of retaining to himself the enhanced value. (*a*)

If on such a contract the proposed vendee is sued, if he has taken the land, the measure of damages is, of course, the price with interest; if he has neither taken the land nor paid the price, in England the plaintiff receives only nominal damages, unless the land has fallen in value, or he has otherwise suffered actual injury, on the ground that if he recovered the full price, he would have that and the land too; because the recovery

unable to distinguish it from *Hopkins* v. *Grazebrook*." So it has been held in this country, that, where the agreement is that a third person shall convey land, the measure of damages is the value of the land at the time when it should have been conveyed. Dyer *v.* Dorsey, 1 Gill & J. 440; Pinkston *v.* Huie, 9 Ala. 252. But see Tyrer *v.* King, 2 Car. & K. 149.

(*a*) Hopkins *v.* Lee, 6 Wheat. 109. See also, Cannell *v.* M'Clean, 6 Harris & J. 297; Nichols *v.* Freeman, 11 Ired. 99; Bryant *v.* Hambruck, 9 Ga. 133; Whiteside *v.* Jennings, 19 Ala. 784; Hill *v.* Hobart, 16 Me. 164; Warren *v.* Wheeler, 21 id. 484. In some of these cases the doctrine of those American cases, cited *supra*, note (*x*), that actions on a covenant to convey, are so far analogous to those upon covenants for title that the damages should be measured by the same rule, is rejected. In Nichols *v.* Freeman, the defendant was prevented from giving a good title by a levy of execution upon the land, and there appears to have been no fraud on his part. The value of the land at the time of the breach was regarded as the measure of damages. *Pearson*, J., said: "Our attention has been called to the fact, that in the action for a breach of a covenant of quiet enjoyment, the measure of damage is, the price paid for the land, which is taken, as between the parties, to be the true value. . . . . . The analogy does not sustain the position for which it was invoked; because the rule of damages in that action is founded on peculiar reasons. The covenant for quiet enjoyment is a substitute for the old *real warranty*, the remedy upon which was by voucher, and if the demandant recovered, the tenant had judgment against the voucher for other lands of equal value." See also, the very able decision of *Buchanan*, C. J., in Cannell, *v.* M'Clean. And even in New York some doubt seems to have been thrown upon the rule laid down in Baldwin *v.* Munn, cited *supra*, note (*x*), in the late case of Fletcher *v.* Button, 6 Barb. 646; where, under a verbal contract, land is to be conveyed in consideration of a specific sum payable in work, the vendee, who has performed the work, may consider the agreement as a nullity, and recover the value of his work, not exceeding the sum specified, with interest; and he can only resort to evidence of the value of the land as a measure of damages, when no sum is specified. King *v.* Brown, 2 Hill, 485; Burlingame *v.* Burlingame, 7 Cowen, 92; Rohr *v.* Kindt, 3 Watts & S. 563; Jack *v.* McKee, 9 Penn. St. 235; Bash *v.* Bash, 9 id. 260. See Boardman *v.* Keeler, 21 Vt. 84.

cannot have the effect of passing the fee of the land. (*b*) In this country, some cases have thrown doubt on this rule, but upon the whole we think it well established. (*c*)

If the contract be to give land for work and labor, this may be treated as for so much money in work and labor.

If the action be brought on the usual covenants in leases, the rule is, as before, compensation. Hence a tenant for life of an estate leased by him, can recover only such damages for breach of covenant by the lessee, as are proportionate to the injury done to the life-estate. (*d*) And the action may be brought on

(*b*) In Hawkins *v.* Kemp, 3 East, 410; in Goodisson *v.* Nunn, 4 T. R. 761, and in Glazebrook *v.* Woodrow, 8 id. 366, it seems to have been assumed that the vendor, on tender of a conveyance, could recover the amount of the purchase-money. But in the late case of Laird *v.* Pim, 7 M. & W. 474, where the vendor had offered to execute a conveyance, and was "in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him," it was said by *Parke* B., in delivering the opinion of the court: "The measure of damages, in an action of this nature is, the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract. It is clear that he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again."

(*c*) In Franchot *v.* Leach, 5 Cowen, 506, the jury, under direction of the judge, found the consideration-money and interest as damages for the vendee's breach of his contract, and no objection seems to have been made to the direction. In Alna *v.* Plummer, 4 Greenl. 258, the defendant having bought a pew at auction, and refused a deed when tendered to him, it was *held*, that the measure of damages was, "the price agreed to be paid for the pew by the defendant, who will be entitled to the deed whenever he chooses to accept it." This doctrine was approved in Shannon *v.* Comstock, 21 Wend. 457, 460, and in Williams *v.* Field, cited in Sedgwick on Damages, p. 192, and appears to be now well settled in Maine; Oatman *v.* Walker, 33 Me. 67. But see Sawyer *v.* McIntyre, 18 Vt. 27.

(*d*) Hence a tenant for life of an estate leased, can only recover such damages for breach of covenant by the lessee, as are commensurate with the injury done to the life-estate. Evelyn *v.* Raddish, Holt, 543; McKeen *v.* Gammon, 33 Maine, 187, 192. In New York, the same rule of damages is applied in actions on covenants for quiet enjoyment in leases as in conveyances of the fee-simple. The lessee is allowed costs incurred in defending his title and the rents he has paid during the time he is liable for mesne profits to the true owner, with interest thereon; but he can recover nothing for improvements, or the increased value of the premises. Kinney *v.* Watts, 14 Wend. 38; Moak *v.* Johnson, 1 Hill, 99; Kelly *v.* Dutch Church of Schenectady, 2 Hill, 105, 115. See Lewis *v.* Campbell, 8 Taunt. 715, 3 B. & Ald. 392. If a lease contains a covenant by a tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire; if they are burnt down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter. Digby *v.* Atkinson, 4 Camp. 275. In Dewint *v.* Wiltse, 9 Wend. 325, "where a party took a lease of a ferry, and covenanted to maintain and keep the same in good order, and instead of so doing, diverted travellers from the usual landing to another landing owned by himself, by means whereof a tavern-stand belonging to the plaintiff, situate on the first landing, was so reduced in business as to become tenantless, it was *held*, in an action by the

the covenant to repair, before the end of the term, because, although a tenant has, in one sense, the whole term in which to repair, yet the covenant to repair is broken as soon as repairs ought to be made, and are not made. (*e*) By parity of reasoning the same action might be brought against a landlord, when he, in the same way, failed to discharge his obligations.

A covenant to repair, or to keep the premises in good and sufficient repair, does not mean, only, that they must be kept in the same repair in which they were when the tenant took them, for this may not be good repair; but, it has been held, that the jury might properly take into consideration the condition of the premises at the commencement of the lease, in order to ascertain what was meant by the words, repair, or good repair, as used in the lease. (*f*)

landlord for breach of the covenant, that he might assign, and was entitled to recover as damages the loss of rent of the tavern-stand."

(*e*) Luxmore *v.* Robson, 1 B. & Ald. 584; Schieffelin *v.* Carpenter, 15 Wend. 400.

(*f*) Burdett *v.* Withers, 2 Nev. & P. 122; Stanley *v.* Towgood, 3 Bing. N. C. 4. See Harris *v* Jones, 1 Moody & R. 173; Gutteridge *v.* Munyard, 7 C. & P. 129. In Thompson *v.* Shattuck, 2 Met. 615, the defendant had covenanted to keep one half of a mill-dam in repair, but the plaintiff's assignor was bound to repair the other half. The defendant failed to make seasonable repairs, the plaintiff repaired the whole, and claimed as damages one half the expense of repairs and the loss of profits in the mill on account of delay. He recovered the former, but not the latter. *Dewey*, J., in delivering the opinion of the court, thus stated the grounds of the decision: "It being the duty of Plumb [the plaintiff's assignor] to make one half of the repairs, and it being a right which he might at once exercise, to proceed to make the whole repairs, after neglect and refusal of the defendant, upon reasonable notice to aid in the repairs; if said Plumb delayed to exercise that right, and thereby sustained a loss, it is one which he alone must bear." See Green *v.* Mann, 11 Ill. 613. In Green *v.* Eales, 2 Q. B. 225, it was held, that a lessor who has covenanted to repair the demised premises, is not liable to the lessee for the rents he was obliged to pay for another residence, or for expense in fitting it up, while the repairs were going on, although the lessee was obliged to move out for repairs in consequence of the lessor's neglect.

CHAPTER IX.

ON LIENS

Sect. 1.— *On Lien in General.*

Lien is a right to hold possession of another's property, for the satisfaction of some charge attached to it. The essence of the right is possession; and whether that possession be of officers of the law, or of the person who claims the right of lien, the chattel on which the lien attaches is equally regarded as in the custody of the law. (*a*)

Lien is neither a *jus ad rem* nor a *jus in re*, but a simple right of retainer. It is not therefore attachable as personal property, or as a chose in action, of the person who is entitled to it. (*b*)

The origin of the right of lien has been ascribed to the Roman law. That law gave to the seller a right, which was substantially similar to that which the common law gives by lien; for if the buyer did not pay the money when it was due, and the seller had not delivered the goods, he might retain possession of them as *a pledge*. But what the common law treats as held by a lien, the civil law regarded as and called a pledge, and applied to it the whole law of pledge. (*c*) The Roman law went further than the common law, and vested in a vendor a right of seizure, after delivery to a vendee, or even to a subvendee, if payment of the price was not duly made. By the common law, a sale of the goods passes to the purchaser the property therein, and after delivery the vendor cannot recover them back again, though the vendee immediately become bankrupt.

(*a*) Moss *v.* Townsend, 1 Bulstr. 207.

(*b*) Meany *v.* Head, 1 Mason, 319.

(*c*) Domat, Lib. 1, tit. 2, sect. 3, art. 3. The rule cited by Domat from the civil law, was this: venditor, pignoris loco, quod vendidit retinet, quoad emptor satisfaciat.

Taking its rise in the principles of natural equity and commercial necessity, the doctrine of lien was recognized, to a limited extent, at an early period, and in process of time was much extended in its application, upon considerations of policy and convenience as well as of justice. The earlier form of lien was specific in its nature, and is distinguished by law as a particular lien; which is a right to retain a designated piece of property for a claim attached to that same property. Where not arising from a contract of sale, this form of lien seems to have been confined originally to transactions in which the justice or necessity of the case peremptorily demanded its allowance; as where the party invested with the right was obliged by law to receive goods, or where he had, at his own peril, labor, and expense, saved them from loss or destruction at sea, when the owner was unable to protect them. At a later period, the particular lien was admitted in many instances not characterized by the obligation of duty, or the self-sacrifice above alluded to; and general lien, or a right to retain property of another on account of charges not attaching to that specific property, existing at first only by express contract, was also allowed to be claimed, by implication, from the general usage of trade, or the mode of dealing between the parties, and without any express contract to that effect.

The right of lien as well as the statute right of set-off, operates to prevent circuity of action, but the two differ in several respects as to their operation. Set-off applies only to demands arising *ex contractu;* lien applies as well to those sounding in tort; set-off is barred by the statute of limitations; lien is not; and set-off applies to all debts mutually due in the same right, while lien is restricted to the particular debt for which it is security. Nor, except by agreement, can a debt owed by the party holding a lien, be set off against that for which he holds the lien. (*d*)

(*d*) Pinnock *v.* Harrison, 3 M. & W. 532. This was an action of trover for a quantity of iron materials, which were furnished to the defendant by the insolvent of the plaintiffs, to be made into a carriage. After the work had been commenced by the defendant, and before the bankruptcy of his employer, he bought a second-hand carriage of the latter, paying part cash, and owing part on account. At this time he promised to send home the new carriage, finished or unfinished,

In general, a lien confers no power to sell, even where the keeping would be attended with expense; (e) but where the de-

in two days, and to send in the account. This the defendant did not do; but he subsequently finished the carriage, and upon the failure of the owner, it was claimed of the defendant by the assignees. The charges for making the carriage amounted to £8, upon which amount the defendant claimed a lien upon the carriage; the balance owed by the defendant on account of the second-hand purchase, was about £9, which the assignees claimed to offset against the defendant's charge for work. It was contended, on behalf of the plaintiffs, that, under these circumstances, and considering the state of the accounts, no lien could arise; and, secondly, that even if it could, it had been waived by the defendant's promise to return the carriage, finished or unfinished. These two points being overruled, the case came up for argument upon them in the Exchequer of Pleas, and the court gave judgment for the defendant. Per Lord *Abinger*, C. B. — "A set-off cannot be considered as destroying a lien, unless it be so agreed upon between the parties; and as to the rest, my opinion is, that there was no binding agreement entered into to send the goods home at a particular time; there was a proposal and nothing else; a promise to do so, without consideration, but no binding agreement; and it appeared to me that that proceeded on the understanding that defendant was to go on and finish the work. *Parke*, *Bolland*, and *Alderson*, the other Barons present, all gave opinions clearly maintaining that a claim of set-off is no answer to a lien, unless by agreement.

(*e*) Hunt *v.* Haskell, 11 Shep. 339. This was an action of trover brought by the owner of twenty-five boxes of clocks, against the captain of a vessel who sold them for freight due thereon. The goods were shipped by the plaintiff on the defendant's vessel, from Boston to Bangor, the captain paying a bill of charges at Boston. Owing to ice in the river, the goods were discharged at Frankfort, below Bangor, and the defendant demanded his freight and advances. The owner, thinking the demand too large, tendered what he admitted to be due, and demanded the goods at Frankfort. The defendant refused to receive the amount tendered, and caused the goods to be sold at auction for the amount claimed by him and expenses of sale. The counsel for the defence claimed that there was no wrongful conversion of the goods, as the defendant had a right to make the sale as a common carrier. He argued, that as the lien was admitted to exist, the mode adopted was the only practicable one for giving effect to it, the equity powers of the Supreme Court of the State not extending to a case like this, and the admiralty process in the court of the United States, if available, being an inconvenient and expensive remedy at best. On the other side, it was contended, that the defendant, if entitled to freight, either in full or *pro rata itineris*, had no right to sell the property for the payment thereof. The opinion of the court was given by *Williams*, C. J., who said: "It is very clear that the defendant had no right to cause the sale, of his own mere motion, and without the intervention of legal process for the purpose. The law-merchant recognizes no such right on the part of carriers by sea, under a common bill of lading, such as the defendant had signed in this instance. If the plaintiff was willing to receive his goods at Frankfort, which, by his tender and demand of them there, it seems he was, the defendant might well insist upon a *pro rata* freight, and on detaining the goods until it was paid; but a simple detention only, in the first instance, was all he could insist on. It was urged that the defendant was without a convenient remedy, unless the course he pursued can be sanctioned. — But it is not for courts to alter an established law. It is the duty of courts, as has often been remarked, to expound and apply the law, as it may be found established, and not to legislate." The plaintiff, having claimed that the true measure of damages was the value of the goods at the time of the conversion, notwithstanding, as appeared by the evidence, he had got possession of them again, by causing them to be bought at the sale, by a friend, at a small expense, the court decided upon this point, that whatever damages he sustained, over and above what was fairly due to the defendant, in regaining possession of the goods, he was entitled to, as the true measure of damages. Say the court: "He cannot have judgment for the value of the goods; for he was never divested of his property in them. Neither the acts of the defendant, nor the sale at auction, nor being in

posit is by way of security for a loan, the lender, it seems, may sell upon default of payment. (*f*) This power is, however, usually restrained and regulated by statute; and by other enactments provision is made for the sale of property held under other liens than those of security for loans.

Where the lien is by act of party, it is held that the bailee may use the property as the owner would, unless it will be the worse for use. But the property will be at the risk of bailee

market overt, there being none such in this country, as there is in England, could effect a change in the right of property. The plaintiff, if his tender was sufficient, might have maintained an action of replevin for the goods, against the defendant, or against any purchaser at the auction sale, as well as trover against the defendant; and the latter action is maintainable only upon the ground that the defendant had done, in reference to the goods, what was unauthorized by law." Doane *v.* Russell, 3 Gray, 382; Crumbacker *v.* Tucker, 4 Eng. (Ark.), 365; Thames Iron Co. *v.* Patent Derrick Co. 1 Johns. & Hem. Ch. 93; Fox *v.* McGregor, 1 Barb. 41.

(*f*) Pothonier *v.* Dawson, 1 Holt, 383; Waller *v.* Smith, 5 B. & Ald. 439; Wheeler *v.* Newbold, 5 Duer, 29; Parker *v.* Brancker, 22 Pick. 40. The plaintiff, a merchant in Boston, consigned to Brancker, Delius & Co., commission merchants, in Hamburg, a quantity of coffee, on which, according to previous agreement, the latter made large advances. The plaintiff, in his letters of instructions, limited the coffee at so high a price that the defendants could not sell it. A suit was brought by the defendants in the present action, for the amount of their advances to Parker, and they recovered judgment, credit being given for the amount of the net proceeds of the coffee, which Brancker, Delius & Co. had sold for less than the limits, during the pendency of the suit. Parker instituted this suit against the defendants, as soon as the sale of the coffee below his limits was known to him, and claimed damages for their not selling the coffee at his limit at a certain time, and, secondly, for afterwards selling below his limit, after having commenced their action to recover back their advances. Upon the evidence adduced in the case, the chief justice at the trial, instructed the jury that a commission merchant, having received goods to sell at a limited price, and made advances upon such goods, had a right to reimburse himself by selling such goods at the fair market price, though below the limit, if the consignor refused, upon application, and after a reasonable time, to repay the advances. To this instruction the plaintiff excepted, and the question was reserved for the full bench. In giving the judgment of the full court, *Wilde*, J., says: "The rule of law thus laid down (by the Chief Justice, at the trial), appears to the court to have been stated with perfect accuracy, and with all the qualifications which are applicable to the defendants' right of sale, as claimed by them on the evidence. The law appears to be well settled, both in England and in this country, that the pledgee of personal property, after the debt becomes due, may sell without a judicial process and decree of foreclosure, upon giving reasonable notice to the debtor to redeem. — In the present case the defendants were not merely pledgees, but they were expressly authorized to sell the property consigned to them, and thereby to reimburse themselves for their advances. There was no time limited within which the sale was to have been made. The defendants were therefore bound, by their acceptance of the consignment, to wait a reasonable time, if the sale could not be made for the price limited, although by the delay their security might be impaired. But after such a reasonable time had elapsed, and a demand had been made upon the plaintiff to repay the money advanced, and he had refused so to do, he had no further power, by any principle of law or justice, to control the defendants' right of sale to their prejudice." Porter *v.* Blood, 5 Pick. 54; Howard *v.* Ames, 3 Met. 308.

while in use. (*g*) Where, however, the special interest arises by operation of law, the bailee has no right to use. (*h*)

A voluntary surrender of possession to the owner or any agent of his, destroys the lien, and it cannot be recovered, by resuming possession. There may, however, be a retransfer of possession to the owner for a temporary purpose, as agent or special bailee of the pledgee, without destroying the lien; (*i*) and if the possession be terminated by fraud, the lien will revive if possession be regained. (*j*)

It is a universal rule, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to some subsequent claimant. (*k*)

Liens exist by common law, or are created either by usage, by statute, or by express agreement of parties. As above indicated, the particular lien which is recognized at common law, had its origin in some consideration of necessity for the public good, in the class of transactions to which it was allowed.

The liens created by common law may be divided into two classes, distinguished from each other by the mode in which possession is acquired; namely, those held by bailees, as tradesmen, carriers, inn-keepers, and farriers, and those held by persons not bailees, as venders, salvors; or, by virtue of some legal right, as

(*g*) Coggs *v.* Bernard, Ld. Raymond, 909; Rex *v.* Cording, 1 N. & M. 35.

(*h*) Mores *v.* Conham, Owen, 123.

(*i*) Hays *v.* Riddle, 1 Sandf. 248; Reeves *v.* Capper, 5 Bing. N. C. 136. See this case, note (*k*), p. 600, Vol I.

(*j*) Wallace *v.* Woodgate, R. & M. 193. This was an action of trover for three horses. The defendant was a horse-dealer, and sold the horses in question to the plaintiff, and had taken his bills of exchange in payment. The horses, after the sale, were kept at the defendant's livery stables, and there was evidence to show that the plaintiff had agreed with the defendant that they should remain with him until their keep was paid for. The plaintiff was in the habit of using the horses while they were kept by the defendant, and one day, under pretence of using them, he took them entirely away to other stables. The defendant, finding out where they were kept, in the absence of the plaintiff, repossessed himself of them; upon which the plaintiff brought this action, and the defence was, that the defendant had a right to retain the horses until the keep was paid for, he having a *lien* by agreement. *Best*, C. J., in summing up, told the jury that a livery-stable keeper had not, by law, a *lien* for the keep of horses, unless by special agreement with the owner; and that if they were satisfied there was an agreement to that effect, and that the plaintiff had removed the horses in order to defraud the defendant of his lien, their verdict must be for the defendant. That he had a right, without force, to retake the horses, and that being so repossessed his lien revived.

(*k*) Rankin *v.* Scott, 12 Wheat. 177.

impounders of stray cattle. The mere finder of goods on land, unlike the salvor of property at sea, has no lien thereon for his trouble or expense in taking care of and preserving the goods found; and an action of trover will lie against him if he attempts to retain them from the true owner on a claim for compensation. But it seems that if the owner have offered a specific reward for the restoration of the goods, the finder has a lien upon them, and may retain possession, if the owner refuse to pay the reward. (*l*)

As to liens by usage of trade, both the fact and the extent of the usage are matters of evidence. Usage is presumed to be founded on custom, repeated so frequently, and so notoriously, that everybody may be considered bound to take notice of it. (*m*) Most commonly this usage of trade is appealed to for the support of general liens. For this purpose strong proof is required, and if there be also a common-law particular lien, the evidence of custom, in favor of a general lien also, must be still stronger. The custom given in evidence to establish ancient usage of trade in favor of a general lien, must be a reasonable one. Thus, where it was shown that there was a custom of

(*l*) Wentworth *v.* Day, 3 Met. 352. This was an action of trover for a watch, and was submitted to the court upon an agreed statement of facts. The plaintiff having lost his watch, advertised it in a newspaper, offering a reward of twenty dollars to whoever would return it to the office of the paper, and signed the advertisement. A minor son of the defendant found the watch a few days after the advertisement, and delivered it to the defendant, who took the custody of it for his son, and left it with the newspaper printer, with directions to deliver it to the owner on his paying the $20 reward. The plaintiff was absent from home at the time, but on his return refused to pay the $20, and the defendant resumed possession of the watch. While thus holding it, the plaintiff demanded it of him, but he refused to deliver it up, unless the twenty dollars were paid for his son. The plaintiff refused to pay twenty, but offered to pay ten dollars, which offer the defendant rejected, and this action was then brought by the plaintiff. The court held, that an offer of an express reward, either to a particular person, or, in general terms, by a loser of property, to stimulate the vigilance and industry of others to find and restore it, and a return of the property in consequence of such offer, constituted a valid contract. If before the offer is retracted, one so far complies with it, as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. Upon the ground that the acts of performance by the finder in returning the property, and of the loser in paying the reward, so far as appeared from the advertisement, must be taken to be simultaneous, the court considered that the law would imply a lien from the presumed intention of the parties, arising from the relation in which they stood; and therefore a refusal of the father to deliver up the watch without the payment of the reward in behalf of himself and his son, was not a conversion. Wilson *v.* Guyton, 8 Gill, 213.

(*m*) For the distinction between *usage* and *custom*, see *ante*, vol. 2, p. 543.

warehousemen to hold all goods deposited with them for the general balance due from the party depositing, whether that party were the owner of the goods or not, the court pronounced the custom to be unreasonable and unjust, and therefore bad in law. (*n*) But when a custom has been frequently proved and allowed to exist in any particular trade, the court will not permit it to be disregarded. Thus, Lord *Kenyon* said upon this subject, that he considered a usage of trade which had been so often proved, a settled point; (*o*) and this authority was fully confirmed at a later day by Lord *Ellenborough*. (*p*) A general lien may also be established, as to all subsequent bailments (where the trade is such that the bailee is not compellable by law to receive), by giving express notice to the bailor; any future bailment being regarded as a token of assent on the part of the bailor. And the same effect has been given to a public notice of the proceedings of a body of tradesmen, who assembled together and adopted an agreement among themselves, not to receive any goods to manufacture in the course of their trade, except upon condition of having a lien upon them for any general balance due; knowledge of the notice having been brought home to the party. (*q*) But notice, though brought to the knowledge of the bailor, if not assented to, will not give a general lien to those who, from the nature of their business, are under obligation to accept employment. There may, in any case, be a general lien by particular usage of the parties. It is held, that a new loan, where there is already a security for a prior loan, may be evidence that the security covers the new loan as well as the old. (*r*) Where long-continued acts, inconsistent with the right, afford a presumption that the lien claimed, whether general or particular, has never existed, the claim will not be allowed. (*s*)

(*n*) Leuckhart *v.* Cooper, 2 Hodg. 150, 3 Bing. N. C. 99.

(*o*) Naylor *v.* Mangles, 1 Esp. 109.

(*p*) Spear *v.* Hartley, 3 Esp. 81.

(*q*) Kirkman *v.* Shawcross, 6 T. R. 14.

(*r*) Demainbray *v.* Metcalf, 2 Vern. 691; Prec. in Ch. 419.

(*s*) Ex parte Douglas, 3 Dea. & Chit. 310; where a security for an annuity was deposited by a party with his bankers, one of whom drew the dividends and placed them to his credit. After the death of the party, who died intestate in 1801, the same partner continued to draw the dividends and pay them to the widow of the deceased. The banking firm went into bankruptcy in 1810; but the dividends were still drawn by the partner, and paid to the

Liens created by statute are usually in furtherance of the common-law principles, based upon justice and public convenience, and are generally designed to cover cases where the possession is not with the consent of the owner of the property, or where exclusive possession is impossible. Such are the liens of log-drivers, mechanics, builders of houses, ship-builders, and material-men, for supplies or repairs to domestic vessels, mutual insurance companies, judgment liens, and the like.

Liens by express contract are created sometimes by placing property in the hands of another for the execution of some particular purpose upon it, with an express agreement between the bailor and the bailee, that it shall be considered as a pledge for the labor or expense which the execution of the purpose may occasion. They are also created by the delivery of chattels in pawn for safe custody, the sole purpose being security for a loan made to the owner on the credit of them, or by their delivery in pledge as security for an existing debt owed by the owner to the bailee. The subject of pledge is treated in the chapter on Bailment.

Though a particular lien may be acquired by possession received from an agent of the owner, yet no general lien is thus acquired for the agent's own debt, the bailee knowing the agency. The rule of law is, that general liens are not to affect the rights of third parties, not claiming under those from whom the lien is derived. Hence a carrier of goods, holding a particular lien on them for freight to be paid by the consignor, cannot retain them from the consignee for a general balance due by the consignor. (*t*) Nor can a general lien prevail against a prior common-law right; as that of a carrier for a general balance due by the consignee, against the right of stoppage in transitu by the consignor. If the latter discharge the particular lien for carriage, he may have the goods. (*u*)

widow, up to 1822, when the partner died. After this, the assignees of the bankers claimed a lien upon the security, for a debt due from the intestate to the banking-house. But it was *held*, that after so long an abandonment of the lien, they could not then support it.

(*t*) Richardson *v.* Goss, 3 B. & P. 419, *supra*.

(*u*) Oppenheim *v.* Russell, 3 B. & P.

No lien can be acquired by any fraudulent act; as by paying freight and charges upon property belonging to another, for the purpose of getting wrongful possession of it; nor by acquiring possession of property wrongfully, and expending money or labor upon it; nor generally, by the voluntary and unauthorized act of the party claiming the lien. Nor is any lien acquired where the party has entered into a special agreement which shows that he relied solely upon the personal credit of the bailor.

Where the party giving possession of the property, has no power to dispose of it, no lien will attach; and it has been repeatedly decided, that at common law, a factor with authority to sell property, cannot pledge it so as to create a lien against the owner. (*v*) But statutes, both in this country and in England, have made such acts effectual against the principal, if the bailee claiming the lien acts in good faith, and without knowledge that the factor has no power to pledge.

A creditor who knows that his debtor is in failing circumstances, acquires no lien upon property which he takes as security for an existing debt, as against the assignees of his debtor; such a transaction being regarded as a fraud upon bankrupt laws. That a lien which depends upon the claimant's possession, may attach, it is necessary that the property should come into his hands, or those of his recognized agent; and therefore where bankers, having fraudulently sold out stock be-

42. The plaintiff had sold goods to his customer, and had forwarded them by the defendent, a common carrier. The customer having failed before the goods came to his possession, the plaintiff claimed them of the carrier by virtue of his right of stoppage in transitu, tendering the latter the price of the carriage of the goods, and offering to indemnify him. The carrier refused to give up the goods unless the amount of his general balance against the insolvent, as well as the special freight on these goods, was paid. The plaintiff sued in trover for the wrongful conversion, and the carrier sought to defend by introducing evidence of usage for carriers to detain for their general balance. The court refused to receive the evidence, and upon the hearing as to the admissibility of such evidence, the full Bench decided unanimously against it. By *Alvanley*, C. J., "Then the single question in this case is, whether a stipulation between the consignees and carriers on the Western road, that the latter shall retain as against the former, for their general balance, can take away the common law right which is now firmly established, namely, that till goods have reached either the actual or constructive possession of the consignee, the property in them may, on certain events, revert back to the person by whom they were delivered into the hands of the carrier? The carrier's claim here is in contravention of that right; for there is no third person to whom any right is derived from the consignor." — And see cases *supra*.

(*v*) Graham *v.* Dyster, 6 M. & S. 1; Quieroz *v.* Trueman, 3 B. & C. 342; 5 D. & R. 192; Gill *v.* Kymer, 5 Moore, 503.

longing to a customer, which stood in their names, and used the proceeds, afterwards, while yet in solvent condition, made a special deposite in their own safe or repository, with other private securities of their customers, of certain bonds duly enveloped and inscribed with this customer's name, and accompanied with a written statement that they had deposited the bonds with him as collateral security for his stock, and a promise to replace it, but gave him no information of these circumstances until the eve of their bankruptcy, when they sent the parcel to him with a message that they must stop payment the next morning; it was determined that the customer had no lien upon the bonds as against the assignees, he not having sufficient possession of them prior to the bankruptcy. It was considered that the bankers could not be regarded as his agents for the receipt of the bonds, for want of knowledge and recognition on his part, at the time of the transaction. (*w*)

An express stipulation of a principal, that the proceeds of particular goods shall be paid over to him by his factor, will prevent a lien for a general balance from attaching to the portion of these goods that may be unsold. (*x*) So if there be a special agreement between a factor and his principal, for a particular mode of payment of his charges; or if he have notice of a special agreement between his principal and a third person, as to the application of the proceeds of a particular invoice, the general lien of the factor cannot be set up. (*y*)

SECTION II.

OF THE INCIDENTS OF LIEN.

Continuance of possession being indispensable to the existence of liens at law, an abandonment of the custody of the

(*w*) Wilson *v.* Balfour, 2 Camp. 579.

(*x*) Walker *v.* Birch, 6 T. R. 258.—The case of McGillivray *v.* Simpson, 2 D. & R. 35, is not contrary to this; for the question there at issue was not one of lien, but rather one of set-off of debts under the bankrupt law.

(*y*) Cowell *v.* Simpson, 16 Ves. Jr. 275; Maher *v.* Massias, 2 Black. 1072.

property over which the right extends, divests the lien. In such a case the holder is deemed to surrender the security he has upon the goods, and trusts to the personal responsibility of the owner. But a transfer of the property to a third party, with notice of the lien, and accompanied by a transfer of the right, will not divest the lien. For the third party will in such case be regarded as the servant or representative of the claimant. (*z*) If one who has a lien, claims to detain goods upon a different ground, making no mention of the lien, this will be considered as a waiver; and if the owner sue in trover for the detention, it will be unnecessary for him to prove a previous tender of the amount secured. (*a*)

An alienation of the property by the owner, while in possession of the party holding under the lien, will not divest it, for the alienee must take it subject to the incumbrance. (*b*) Taking the property in execution at the suit of the party having the lien, will destroy his lien, by changing the possession from the bailee, to the sheriff, even though the goods are allowed by the officer to remain with the party. For the possession virtually vests in the sheriff, in order to enable him to sell the goods. (*c*) But property held under a lien is not liable to be taken in execution at the suit of a third party for the debt of the owner; for a sheriff can seize nothing but what he can sell, and he cannot substitute as the owner of the goods a third person, between whom and the original owner there is no privity. (*d*)

It has also been decided, that an attachment of the property held under a lien, at the suit of another creditor, does not divest it, and the claimant under the lien will hold in preference to the

(*z*) Man *v.* Shifner, 2 East, 529; Gladholme *v.* Rowntree, 1 W. W. & D. 280; Pierson *v.* Dunlop, Cowp. 571.

(*a*) Boardman *v.* Sill, 1 Camp. 410. Plaintiff sued in trover for a quantity of brandy which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The Attorney-General contended, that the defendant had a lien upon the brandy for the warehouse rent, and that, till this was tendered, trover would not lie. But Lord *Ellenborough* considered, that, as the brandy had been detained upon a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one,—which would admit of some doubt. The plaintiff had a verdict.

(*b*) Godin *v.* L. As. Co. 1 Burr. 489.

(*c*) Jacobs *v.* Latour, 2 M. & P. 20; 5 Bing. 130.

(*d*) Legg *v.* Evans, 6 Mees. & W. 36.

officer. (*e*) And receipting for the property attached is no waiver of the lien, (*f*) nor is the giving of a bond to the officer, for the safe-keeping and delivery thereof. (*g*) Where, however, goods in possession of the party having a lien upon them, are attached at the suit of such party upon the claim secured by the lien, it is held that the lien, as against the assignees of the bankrupt owner, is thereby lost. (*h*)

A security given to a partnership does not give a lien to a new firm formed by the members of the old and another person. (*i*)

A lien acquired under an illegal contract, if an executed one, may be good; as one arising under usury laws, if they impose a penalty but do not invalidate the contract; or a contract made in violation of the Sunday laws. (*j*) In such cases the maxim, *in pari delicto*, would be applied should the bailor seek a legal remedy. But if the illegality arises solely from the misconduct of the party seeking to establish the right of lien, and is of such a nature as to invalidate the contract which he would enforce, the lien will not be sustained. (*k*)

Under ordinary circumstances, a lien is merged in a purchase of the property by the person holding possession under his lien. But if the owner has lost the power to sell, subsequently to giving the lien, as by commiting an act of bankruptcy, the purchase being itself ineffectual will not invalidate the bailee's lien, by way of merger. The property in the goods will pass to the assignees, but subject to the lien. (*l*) And if a bailee of property encum-

(*e*) Smith *v.* Goss, 1 Camp. 282.

(*f*) Townsend *v.* Newell, 14 Pick. 332.

(*g*) Outcall *v.* Darling, 1 Dutch. (N. J.), 443.

(*h*) Legg *v.* Willard, 17 Pick. 140. The plaintiff was assignee of an insolvent estate, and had received the greater part of the property belonging to the estate, by actual delivery. A portion, however, was in the hands of a workman who had a lien thereon for his labor. Upon hearing of the assignment, the workman caused the goods that were in his possession to be attached, upon a suit brought against the insolvent, for the debt secured by the lien. The assignee demanded the goods of the attaching officer, and upon his refusal to give them up, sued him in trover. The officer defended, on the ground that the assignee could not maintain trover unless he first discharged the lien. But the court held, that the officer had no lien transferred to him by virtue of his attachment for the benefit of the party holding the lien, and that the lien was waived by the party himself by his attachment of the property.

(*i*) *Ex parte* Pease, 2 Rose, 232.

(*j*) Scarfe *v.* Morgan, 4 Mees. & W. 270.

(*k*) Fergusson *v.* Norman, 5 Bing. N. C. 76; Strong *v.* Hart, 6 B. & C. 160; 9 D. & R. 189.

(*l*) White *v.* Gainer, 2 Bing. 23; 1 C & P. 324.

bers it with a lien for the cost of services done upon it, and subsequently induces the party holding the lien to buy it of him, by fraudulently representing that the property is his own; the lien will not merge in the purchase, and the real owner cannot reclaim his property from the holder, without discharging the debt secured by the lien. (*m*) It was formerly held, though somewhat vaguely, that a common-law lien would be waived by a special agreement as to the price to be paid to the bailee for the service to be performed upon the property; (*n*) but it is now settled, that a special agreement that will operate thus, must be inconsistent with the lien itself. Merely fixing the price is no waiver. (*o*)

Taking other security for the debt will discharge a lien upon personal property; and even the taking of the party's own negotiable note or bill, payable at a future time; (*p*) unless the paper be dishonored, while the property remains in his hands; then, if the taker holds or is liable on the paper, the lien would revive. (*q*) If the note or bill given by the vendee for goods,

(*m*) Lord *v.* Jones, 11 Shepl. 439. In this case the Supreme Court of Maine decided, that a farrier, having acquired a lien upon a horse for the cost of his care and cure, and having subsequently, while the horse remained in his possession, bought him from the person who had committed the animal to his care, under the false belief that this person was the owner of the horse, did not thereby waive his lien; because, by the want of title in the vendor, the contract was not effectual or operative for any purpose.

(*n*) Brennan *v.* Currint, Sayer, 224; Chase *v.* Westmore, 5 M. & S. 180.

(*o*) Metcf. Yelv. 66; *Gibbs*, C. J., in Hatton *v.* Bragg, 7 Taunt. 14.

(*p*) Hewison *v.* Guthrie, 2 Bing. N. C. 755; 2 Hodges, 54.

(*q*) Feise *v.* Wray, 3 East, 93; New *v.* Swain, 1 Dans. & Loyd Merc. C. 193. Castle *v.* Sworder, 6 Hurl. & N. 828. In this case, heard in the Court of Exchequer Chamber on appeal from the Exchequer Court, the question of vendor's lien upon goods sold upon credit, but remaining in the actual possession of the vendor after the time of credit had expired, was incidentally discussed; and the judges seemed to be of opinion that in such a case a lien would attach, unless the circumstances clearly showed that the character of vendor had changed to that of warehouse-man. The defendant had bought of the plaintiffs, through their travelling agent, a quantity of liquors in bond, upon a credit of six months, and the plaintiffs had marked off the specific casks sold, in their bonded warehouse book, and sent the defendant an invoice and letter stating that the goods could remain in bond, free of storage, for six months. The defendant retained the invoice, and after the time of credit had expired, upon being applied to by the travelling agent of the plaintiffs for the payment of the price, he did not pay, but asked the agent to take the goods back, or to sell them for him, which was declined. He subsequently wrote a letter to the plaintiffs, asking them what they would give for them. He bought the goods by sample, and never examined them; and the casks were never actually removed from the plaintiffs' bonded-warehouse. The plaintiffs sued for the price, and the defendant resisted, on the ground that there was no delivery or acceptance of the goods, to satisfy the statute of frauds. A verdict was taken for the defendant, with leave to the plaintiffs to move for a verdict for the amount claimed, if the Court of Exchequer should be of opinion that there was any

come back to his hands again, *bona fide*, though the vendor has not received value for it, the lien of the vendor, destroyed by taking the negotiable paper, will not revive so as to enable him to retain the goods from the vendee. (*r*) The principle upon which the law considers the taking a security as a waiver of the lien, is not the result of a mere usage of trade, or of the rule of law that the special contract determines the implied one; but is prompted by the consideration of the inconvenience that would result from detaining the goods from the uses of trade, by extending a lien during the whole period which the security has to run. (*s*) The security, however, may be received under such special circumstances, as not to operate as a waiver of the lien.

evidence on which a jury might find for the plaintiffs. A rule Nisi was accordingly obtained. Upon argument before the Court of Exchequer, the judges delivered judgment *seriatim*, unanimously discharging the rule. At the hearing before the Court of Exchequer Chamber, upon appeal, the argument was urged for the defendant, that as the vendor's lien attached after the expiration of the credit, there could have been no sufficient delivery and acceptance, to take the case out of the statute of frauds; but the court regarded the question of lien as not arising in this case; for the possession of the plaintiffs being originally that of vendors, was converted by the subsequent dealings into a possession as agents of the vendee. Upon the main question, the judges were unanimously of opinion, that there was evidence upon which the jury might find for the plaintiffs, and they accordingly reversed the judgment of the court below. — The authority of New *v.* Swain, was not questioned in 4th Ed. of this work, as erroneously stated by *Byles*, J., in the above report from 6 Hurl. & Nor. 828. — See Miles *v.* Gorton, 2 Cr. & M. 504.

(*r*) Bunney *v.* Poyntz, 4 B. & Ad. 568; 1 N. & M. 229. This was an action of trover for twenty tons of hay which an agent of the defendant had sold to the plaintiffs' vendor. A promissory note was given by this vendor for the price of the hay, which the agent of the defendant got discounted at the bank of the plaintiffs, the proceeds being passed to the credit of the agent in reduction of a balance owed by him to the bank. The agent subsequently became bankrupt, and the note was dishonored at maturity by the promisor. Before the note became due, the first purchaser of the hay had cut and taken away about six tons, when he was forbidden by the defendant to take any more, it appearing that the agent of the defendant had not accounted with him for the price of the hay sold. The purchaser made no further attempt to remove the hay, but sold the remainder of it, standing, to the plaintiffs, receiving from them, in part payment, the discounted note which he had given for the hay, and the balance in money. The plaintiffs having thus purchased the hay, demanded its delivery, which the defendant refused, and this action was brought. The point upon which the case went up to the Court of King's Bench, was, whether the lien of the vendor could revive after the expiration of the term of credit, the note being outstanding in the hands of the plaintiffs as indorsees, and the agent of the purchaser having had value for it. The court gave judgment for the plaintiffs, in the course of which, *Denman*, C. J., remarks as follows: "It was argued upon this rule, that the agent of the vendor, having taken the promissory note of the vendee and negotiated it, the lien of the vendor did not revive upon the dishonor of the note, which was outstanding in the hands of an indorsee. We are of opinion that this argument was right. We think that the defendant is not to be considered as an unpaid vendor, and that he had no right to retain." — "Under all the circumstances, we think that the defendant must be considered as bound to deliver up the hay to the plaintiffs." And see Camidge *v.* Allenby, 6 B. & C. 373.

(*s*) Lord *Eldon*, in Cowell *v.* Simpson, 16 Ves. Jr. 279.

But in a case where an owner of a vessel took a bond from the freighter, binding the goods shipped in a penal sum for non-performance of the covenants, it was held, that there was no lien for dead freight or demurrage. (*t*)

Where the vendor receives a note for goods, and retains them on storage for the vendee, and subsequently agrees, verbally, at the request of the vendee, to take the goods back and give up the note, he has no lien upon the goods for the amount of the note, as against the assignees of the vendee, upon the failure of the latter before the exchange is made. (*u*)

As a general proposition, there can be no lien where credit is given; it is wholly inconsistent with a dealing on credit, and can only subsist, unless by provision of statute, where payment is to be made in ready money, or a bargain is entered into that other security shall be given. (*v*) The lien is then a security that the payment shall be made or the other security given, and payment in the one case, and the delivery of the stipulated security in the other, will equally put an end to the lien. Where a tradesman's lien for work commenced under an implied contract, takes effect, it will be lost if the work be afterwards continued under a special contract as to the mode of payment; for in the nature of things the one contract destroys the other. (*w*)

(*t*) Birley *v.* Gladstone, 3 Maule & S. 205.

(*u*) Chapman *v.* Searle, 3 Pick. 38.

(*v*) Lord *Ellenborough*, in Raitt *v.* Mitchell, 4 Camp. 146.

(*w*) Lord *Eldon*, in Cowell *v.* Stimpson, 16 Ves. Jr. 275; Stoddard Woollen Manuf. *v.* Huntley, 8 N. H. 441. The defendant, a clothier, entered into a special agreement with the plaintiffs' agent, on the 11th June, 1835, to dress what flannels they should make that year, to bale them, on the agent's finding twine, paper and sacking,—the flannels to be finished as fast as they were manufactured, and the agent to pay for finishing once in three months. Under this agreement flannels had been dressed by the defendant and received by the plaintiffs. Prior to the 11th of December, 1835, the defendant had dressed and finished two bales which remained with him, and between the 25th and 30th of the month, the agent demanded possession of the two bales, but the defendant declined to deliver them until he received his pay for dressing, which it was admitted had not been paid. The plaintiffs brought trover for the conversion of the two bales by the defendant, on the 30th of December, 1835. The case was by agreement of parties submitted to three referees, who found the above facts, and believing the law to be with the plaintiffs, made a report in their favor. The question of law was heard by the full court, and judgment given for the plaintiffs. Per *Parker*, J.: "The operation of a lien is to place the property in pledge for the payment of the debt; and where the party agrees to give time for payment, or agrees to receive payment in a particular mode, inconsistent with the existence of such a pledge, it is evidence, if nothing appears to the contrary, that he did not intend to rely upon the pledge of the goods, in relation to which the debt arose, to secure the payment. In this case the defendant con-

It is held, however, that one may sell a thing on credit, or for a future payment, and make it a part of the bargain, that the thing sold shall remain in the possession of the seller, until the credit expires, and the payment is made. (*x*)

SECTION III.

OF THE SEVERAL KINDS OF LIEN.

An Innkeeper's lien appears to be one of those arising from the necessity which the law imposes upon certain persons, holding themselves out as public servants in their several callings, to receive and execute the orders of all who call upon them for their peculiar service. So far as they have accommodations, and payment is offered to them, these *quasi* public servants are under obligation to render the service demanded; and as a consequence of this enforced duty, they are privileged with a hold upon the property of the debtor which comes into their hands during the service in which the debt is incurred, as security for the debt. Of a similar character is the service of a public carrier, and of a farrier; and they also are protected by a lien upon the property upon which they exercise their respective callings.

tracted to dress the flannels, and to receive his pay quarterly; but the flannels, as fast as they were dressed, were to be delivered to the plaintiffs, whenever they called. This was the legal effect of the contract, and the mode pursued by the parties. As to all the flannels, then, which were demanded by the plaintiffs within each quarter, no lien could attach, because the plaintiffs had a right to receive them as soon as dressed, while the price of the defendant's labor upon them would not be due until the expiration of the quarter. Had these flannels been demanded prior to the 11th of December, the defendant could have had no claim to retain them as a pledge for the payment, for there would have been a present duty to deliver, while the time of payment had not arrived. If, then, the defendant can sustain a defence, it must be because the flannels now in question were not demanded before the expiration of the quarter, and remained in his hands until payment became due. But we think this circumstance cannot alter the case. There is nothing in the contract itself to show that the parties contemplated any conditional lien, nor anything in the case to support a lien dependent upon the accidental circumstance of goods remaining in the possession of a party when the time of payment arrives, where a credit has once been given." Fielding *v.* Mills, 2 Bos. (N. Y.), 489.

(*x*) Martindale *v.* Booth, 3 B. & Ad. 498; Hall *v.* Tuttle, 8 Wend. 374; Waterston *v.* Getchell, 5 Greenl. 435; Lunt *v.* Whitaker, 1 Fairf. 310.

An Innkeeper's lien extends to the detention of his guest's property for his own lodging and food, and of his horse for the price of provender and stabling. If he permit guest or horse to depart on credit, he looses his lien, and can never after assert it for that debt if the guest come again.

There is an *obiter dictum* of an English judge, that an innkeeper may detain his guest until payment is made; (y) but the doctrine has in later times been repudiated, and the question settled in the negative. (z) By the same authority it has been settled, that nothing upon the person of the guest can be detained by lien. (a) An innkeeper has no power of sale at common law, over the goods which he detains for lien. This power exists by local custom as to certain guests, in some parts of England, and has been asserted to apply to the sale of a horse retained for the expense of his keeping, by innkeepers generally. But it has been authoritatively denied, both in this country and in England. (b) By common law, stablers who are not innkeepers have no lien upon the horses which they are employed to keep. (c) The reason for this denial, as given in

(y) Mr. Justice *Eyre*, in Newton *v.* Trigg, 1 Show. R. 269.

(z) Sunbolf *v.* Alford, 3 Mees. W. 248; 1 Horn. & Hurl. 13; and see Wolf *v.* Summers, 4 Camp. 631.

(a) See note (z), *supra.*

(b) Chase *v.* Westmore, 5 M. & S. 185; Fox *v.* McGregor, 11 Barb. 41.

(c) Judson *v.* Etheridge, 1 Cr. & M. 743; Sanderson *v.* Bell, 2 Cr. & M. 304; Fox *v.* McGregor, 11 Barb. 41. The plaintiff was the owner of a horse, which, by some unexplained means, but without the knowledge or consent of the owner, came into the possession of the defendants, who were innkeepers. The horse was kept by the defendants for about eight weeks, when they caused him to be sold at auction, claiming to sell him "by virtue of an innkeeper's license." It did not appear that the owner of the horse had ever been a guest of the defendants, and all the account that the latter were able to give of their possession, was, that their hostler found the animal tied, in their stable, about eight weeks before the sale, and that he was regularly fed with hay and oats, up to the day of sale. The plaintiff sued in trover for the wrongful conversion of the horse by the sale at auction. The case was tried before a justice of the peace, who gave judgment for the plaintiff, for the value of the horse. The county court of Rensselaer county reversed this judgment, and upon appeal to the Supreme Court, the latter judgment was reversed, and that of the justice affirmed. The Supreme Court held, that the defendants had no right to sell the horse as a stray, without pursuing the course pointed out by the statute, which they had not done; that they could have no lien as livery stable keepers, unless there was an express agreement for one; that they acquired no lien by virtue of their employment as innkeepers, unless the horse was delivered to them by a guest; and that even if it might be presumed, from the nature of their employment, that the horse belonged to one of their guests, still they would have no right to sell it in satisfaction of their lien; the remedy for the enforcement of the lien being by action in the nature of a bill in chancery. In any aspect of the case, the court held, that there was a wrongful conversion, and that the plaintiff was entitled to recover. Hickman *v.* Thomas, 16 Ala. 666; Miller *v.* Marston, 35 Me. 153.

the cases, is, that the use by the owner is inconsistent with the requirements of a lien. But if training be the principal motive in placing the horse with the stable keeper, and the possession be continuous, the usual tradesman's lien will attach. (*d*) And the stabler has a lien upon a mare sent to his stable to be covered by a stallion. (*e*)

If an innkeeper receives his guest as a boarder at an agreed price per week, the common law lien of an innkeeper does not attach; but in such cases he would have the benefit of the statute lien, if any, provided in favor of boarding-house keepers.

There is no lien at common law in favor of agisters of cattle, it being considered inconsistent with the necessary enjoyment of the property. (*f*)

A farrier's lien is special, and is said to arise from his legal obligation to shoe horses whenever offered, if he have sufficient materials for the purpose, and an adequate reward be offered him. He has also a lien for his services in keeping and curing a horse received by him for that purpose. (*g*)

(*d*) Bevan *v.* Waters, 3 Car. & P. 520; M. & M. 236.

(*e*) Scarfe *v.* Morgan, 4 Mees. & W. 270; 1 Horn. & Hurl. 292.

(*f*) Jackson *v.* Cummings, 5 Mees. & W. 342; Goodrich *v.* Willard, 7 Gray, 183; Cummings *v.* Harris, 3 Vt. 245. This was an action of trover for a number of sheep, and was submitted to the jury on the general issue. The plaintiff produced a written contract, whereby the defendant acknowledged he had received the sheep in question, and was to keep them a certain period, and wash and shear them, and do up the wool, &c., for sixty-seven cents a head. The fleeces were received by the plaintiff, and indorsed on the contract. The plaintiff proved a demand for the sheep, and the defendant's refusal to deliver them unless first paid for the shearing, &c. The county court was requested to instruct the jury, that the defendant had no right to retain the sheep for the keeping, but declined to do so, and a verdict was found for the defendant. The plaintiff brought the case before the Supreme Court upon exceptions, and it was there decided, that the defendant had no lien upon the sheep for the keeping. In delivering the opinion of the court, *Hutchinson*, C. J., says: "The usual cases in which the law creates a lien, are, where the person performing services would have no other sure remedy; as a blacksmith shoeing a horse for a stranger; or an innkeeper furnishing entertainment for travellers; and where the persons applying for these services are not strangers, the usage of their deal may be such, that the law will create a lien. For instance, the course of their deal may be, that payment for the services is always made before the property is taken away. But where the business is done under a personal contract, the law implies no lien; but the parties may so form their contract as to create a lien, which the law will enforce. Here was a personal contract; and no lien was created by the terms of it. Of course the plaintiff was entitled to the sheep, and the defendant had a right of action to recover pay for keeping them. But the defendant had no lien upon the sheep for his pay for such keeping."

(*g*) Lane *v.* Cotton, 1 Ld. Ray. 654; Lord *v.* Jones, 11 Shep. 439. We doubt whether it has ever been judicially decided in this country, that a farrier is under obligations to render his services upon a proper demand for them. We know of no American authority upon that point. But a farrier's common-law lien is recognized by

A carrier's lien by common law, is special; but he may have by express contract, or by general usage, a general lien for the balance due him by the owner; but not against third parties who are owners. (*h*) The doctrine is laid down by the English authorities, that a common carrier, being obliged to receive and convey goods for hire, is exempt from any necessity to inquire into the title of parties delivering them, and that he may detain them against the true owner until the particular carriage is paid, though the latter should prove that they were stolen from him by the person who delivered them to be carried. (*i*) But in this country the doctrine has been somewhat modified; and it has been laid down, that the carrier is bound to receive and carry goods, only when offered by their owner or his authorized agent; and then only upon the payment of the carriage in advance, if it be required. (*j*) It is also held in Massachusetts and in Michigan, that a common carrier has no lien upon goods for their carriage, against the true owner, although he receive them innocently from one wrongfully in possession thereof. (*k*)

some of our best legal writers, and in some decisions of the courts. Story, in his Agency (§ 355), classes farriers with innkeepers, common carriers, blacksmiths, tailors, shipwrights, and other artisans, who as bailees for work on a thing, have a lien upon it for the amount of their compensation. Kent, in his Commentaries, (2 Vol. 634), classes them with common carriers, innkeepers, and other persons concerned in certain trades and occupations, which are necessary for the accommodation of the people. If we regard the classification of Kent as accurate, it would seem as though the same obligation that is incumbent on common carriers and innkeepers, should rest upon farriers; whereas, the classification made by Story, would not lead to that conclusion; because tailors, shipwrights, and artisans generally, are not bound to exercise their craft upon demand. In the case before the Supreme Court of Maine, cited above, the question of the obligation of the farrier, was not raised, and was not directly alluded to by the court. The issue was, whether the defendant having rendered a farrier's service in the care and cure of a lame horse, could retain the animal from the owner, for the amount of his charge, the horse having been placed with the farrier by a bailee of the owner. The court held, that the farrier's lien attached, and in their opinion, delivered by *Shepley*, J., expressly recognize the common-law lien of the farrier as sustained by the English authorities, and laid down by Kent and Story. The lien of a blacksmith for shoeing a horse, is also recognized by *Hutchinson*, C. J., in the judgment delivered by him in Cummings *v.* Harris, 3 Vt. 245, *vide supra*.

(*h*) Bright *v.* Sneff, 5 B. & Ald. 350; Oppenheim *v.* Russell, 3 B. & P. 42.

(*i*) Yorke *v.* Grenaugh, 2 Ld. Ray. 867 per *Holt*, C. J. Whitaker on Lien, 92; Cross, id. 286.

(*j*) Fitch *v.* Newbury, 1 Doug. (Mich.), 1.

(*k*) Robinson *v.* Baker, 5 Cush. 137. This was an action of replevin for six hundred bbls. of flour, bought for plaintiff by his agent in Western New York, and directed to be forwarded, *via* Albany, over the Western Railroad to Boston. The agent of the Canal Boat Company, which brought the flour from Western New York to Albany, instead of obeying the

A carrier cannot sell goods for freight, of his own mere motion. (*l*) His delivery of some parcels of an owners goods does

instructions given to him, changed the direction of the goods from Albany, so that they were sent to the City of New York, and thence shipped by the defendant's vessel to Boston. This change was made without the knowledge of the owner of the flour, or his agent, and the original instructions as to the way the goods were to be sent from Albany to Boston, were unknown to the intermediate carrier from Albany to New York, or to the defendant. On the arrival of the defendant's vessel at Boston, the plaintiff demanded the flour, and the defendant refused to deliver it, claiming to have a lien thereon for his freight. The plaintiff refused to pay the freight, and commenced this action to recover the flour. The material point raised at the trial, was, whether the defendant had a lien upon the goods, they having been shipped by his vessel without the authority and contrary to the instructions of the owner. The court ruled, that if, in the absence of all knowledge on the defendant's part, of the original contract for the transportation of the flour, and acting under the belief that this was an ordinary case of transportation of goods, put into his charge by an authorized agent, he had performed the service of transportation from New York City to Boston, he would be entitled to his reasonable charges for freight, and had a lien upon the flour therefor. The case came up for consideration of the full bench, upon report of the presiding judge, and it was there determined that the ruling could not be sustained, and that if a carrier receives goods innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid. In giving the opinion of the court, *Fletcher*, J., after citing and weighing what authorities are to be found upon the question, and examining the general principles applicable to the case, proceeds to say: "Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others, apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly, by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of King *v.* Richards, 6 Whar. 418, it was decided, that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods. The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives the goods?" Fitch *v.* Newbury, 1 Doug. (Mich.), 1. And see Bates *v.* Staunton, 1 Duer, 79; also, Buskirk *v.* Purin, 2 Hall, 561.

(*l*) Hunt *v.* Haskell, 11 Shepl. 339; Lecky *v.* McDermott, 8 S. & R. 500; Crumbacker *v.* Tucker, 4 Eng. (Ark.), 365; Bailey *v.* Shaw, 4 Fost. (N. H.), 297. In this case there was a count in trover for a quantity of wool which the

not defeat his lien on the remainder for his whole charge. (*m*) But if there be two contracts to carry, with different termini to the voyage or transit in each contract, no lien attaches for freight under the one contract, upon goods shipped under the other, and improperly detained on board by the carrier, since no lien can be acquired by wrongful possession. (*n*) And if goods directed to one place, be improperly carried on to another, no lien will attach. (*o*)

We are to consider next, a class of liens that arise, not from an enforced duty of the bailee, but from voluntary service performed at the request of the owner of the property. These liens are based upon usage, which, by its reasonableness and long continuance, has acquired the sanction of law. Such are the liens which are possessed by artisans generally, traders, and agents of various kinds.

A Tradesman's lien is usually a special one, upon the article committed to him for the exercise of his trade thereon, and depends entirely upon possession. The rule was laid down in an early English case, and since that time has been generally followed, that wherever goods are delivered to a tradesman for the execution of the purposes of his trade upon them, he has a particular lien upon them. (*p*)

A lien of this kind may be acquired upon goods received from an agent, as well as from the owner himself. And where the agent who has this power of disposing of the property of his

defendant had purchased from a common carrier, to whom the plaintiff had intrusted it for transportation. The defendants contended, that as they had purchased of the carrier, in good faith, and for a valuable consideration, they were not answerable in the action. But the court instructed the jury, that although they should find the vendor to be a common carrier, and that as such he sold the wool to the defendant for a valuable consideration, in the absence of any marks to indicate the ownership of the goods, and the defendants purchased it in good faith, and converted or sold it before any claim was made by the plaintiff, they would still be liable for it. The case went up to the full bench, upon exceptions to this ruling among others; but the doctrine was fully sustained by the court; the cases, Hartop *v.* Hoare, 1 Wils. 8, McCombie *v.* Davis, 6 East, 538, Mowrey *v.* Walsh, 8 Cow. 238, Hoffman *v.* Noble, 6 Met. 68, Covill *v.* Hill, 4 Denio, 323; being cited in support.

(*m*) Boggs *v.* Martin, 13 B. Mon. 239.

(*n*) Bernal *v.* Pym, 1 Gale, 17.

(*o*) Bernal *v.* Pym, 1 Gale, 17; Ferguson *v.* Cappeau, 6 Har. & J. 400.

(*p*) *Ex parte* Deeze, 1 Atk. 228; Townsend *v.* Newell, 14 Pick. 332; McIntire *v.* Carver, 2 W. & Sgt. 392; Hanna *v.* Phelps, 7 Ind. 21; Moore *v.* Hitchcock, 4 Wend. 292. In the latter case it was decided, that where goods upon which a mechanic had a lien, were taken on execution by a creditor of his employer, the mechanic could only recover in trover to the extent of his demand, and not to the full value of the goods.

principal so as to confer a lien, though he have no authority to raise money upon it, gets a loan from the tradesman upon a pledge of the property, the latter, being ignorant at the time that the agent is not the owner of the property, may retain it against the real owner, not only for his work upon the property, but also for the money advanced. (*q*)

So where there is an advance made to the owner by the tradesman, upon the faith of a promise that the goods shall be committed to him, and the owner afterwards parts with the ownership, if the goods come to the tradesman's possession before the new owner can assume control of them, it seems that the tradesman may hold them, as well for the money advanced as for the work done upon them. (*r*) But if the goods be parted with, and the tradesman's lien thus lost, he cannot recover it by a stoppage in transitu, under the same circumstances that a vendor might. (*s*)

The tradesman's lien will, like the common carrier's, hold a part of the goods for the whole claim upon them. (*t*) But a lien on a chattel for labor and materials, gives no right at common law to sell the chattel to enforce the lien. (*u*) And by giving credit for a specific time, a tradesman loses his lien; (*v*) but the lien would attach if the property remained in his hands at the time the credit expired, and the money due was not paid. Printers and publishers have a lien on works for the charge for printing,

(*q*) Richardson *v.* Goss, 3 B. & P. 119.

(*r*) This is also decided in the case cited in the preceding note.

(*s*) Sweet *v.* Pym, 1 East, 4. The plaintiff, assignee of a bankrupt, brought an action of trover against the defendant, a fuller of cloth, for converting a quantity of cloths which belonged to the bankrupt's estate. The defendant had been intrusted with the cloths by the bankrupt for the purpose of fulling them, and having finished them, had shipped them to the latter in compliance with his orders, taking no bill of lading, but sending an invoice of the cloths. Soon after the vessel sailed, the defendant heard of the bankruptcy of his employer, and having a claim against him for a general balance, he intercepted the vessel before its arrival at the port of destination, took from the captain a bill of lading of the goods to his own order, and by virtue thereof, received the goods upon their being landed. The defendant claimed to hold the cloths by virtue of his general lien, existing by the custom of trade. The court of King's Bench held, that the custody of the goods was changed by the delivery to the captain for transportation to the owner, by his order and at his expense; and as the defendant's right of lien for his general balance could not extend beyond the time of his actual possession, judgment must be given for the plaintiff.

(*t*) Partridge *v.* Dartm. Col. 5 N. H. 286.

(*u*) Doane *v.* Russell, 3 Gray, 382.

(*v*) Raitt *v.* Mitchell, 4 Camp. 146; Fielding *v.* Mills, 2 Bos. (N. Y.), 489.

but not upon the stereotype plates put into their hands for that purpose, unless they have paid the cost of the plates, in which case they may hold them for money thus paid. (w)

Some trades have a custom for a general lien upon all an employer's goods for the general balance due for work. This has been more distinctly recognized in England than in this country. Among others, calico-printers enjoy this lien; also fullers, in some localities, and perhaps dyers, though this admits of some doubt. Packers also have a lien for their general balance, including advances of money; they being regarded, to some extent, as factors. (x) Tailors and millers have only a particular lien for work done upon the goods committed to them; but a tailor does not lose his lien by permitting his customer to try on the suit in his presence. (y)

A vendor of chattels has, as we have seen, a lien upon them, by common law, as long as they continue in his possession, and the vendee neglects to pay or tender the price. (z) By the sale,

(w) Bleaden *v.* Hancock, M. & M. 465; 4 Car. & P. 152. In this case the defendant claimed to hold certain stereotype plates for his charges in printing from them, and the assignees of the owners brought trover against him. To establish the defence, witnesses were called, some of whom testified to instances in which the claim of lien upon stereotype and copper plates had been made and acquiesced in; while others testified to instances in which it had been successfully resisted. *Tindal*, C. J. left it to the jury to say, whether any course of dealing, so general and uniform as to amount to a usage, had been affirmatively established by the evidence; remarking, that this was not the case of a lien claimed by one who has bestowed labor or expended money upon an article, and who may detain it till he is paid. The jury found against the claim of lien, and gave a verdict for the plaintiff. In Dodsworth *v.* Jones, 4 Duer, 201, the plaintiff sought to obtain possession of certain stereotype plates made by the defendant upon the order of a firm of printers, whom the plaintiff had contracted with to print and publish a music book composed by him. The printers set up the matter to cast the plates from, and furnished it to the defendant, but failed before the plates were delivered to them, owing the defendant about $300, besides the sum charged for making the plates in question, which was $90. The plaintiff settled with the printers, paid their bill, including their charge for the stereotype plates, and took from them an order on the defendant, requesting the delivery of the plates to the plaintiff on his paying the amount of the defendant's lien thereon for the work done. The order was presented by the plaintiff, and the sum of $95 tendered; but the defendant refused to give up the plates unless the whole amount of the debt owed by the printers was paid, stating the sum at $400. The court below gave a *pro forma* verdict for the plaintiff, subject to the question of law whether he could maintain the action. It was held, by the full bench, that the plaintiff could not recover in this form of action, unless he could prove that he was entitled to the possession of the plates at the time the action was commenced; that the tender to defendant, not accepted by him, did not divest him of his title and transfer it to the plaintiff; and therefore the verdict must be set aside.

(x) Green *v.* Farmer, 4 Burr. 2222; *Ex parte* Deeze, 1 Atk. 228.

(y) Hughes *v.* Lenny, 5 Mees. & W. 187.

(z) Mason *v.* Lickbarrow, 1 H Black. 363; Parks *v.* Hall, 2 Pick. 206.

the general property vests in the vendee, but a lien or special property remains in the vendor; and therefore this special property will be a good defence in an action of trover. A part payment will not divest this lien. As, if any thing remains to be done to the thing purchased, by the vendor, before it can be delivered to the vendee, the property does not pass, here there is no mere lien in the vendor, but the general property in the article remains in him, because the sale is not completed. (*a*) If, by the conditions of sale, it is apparent that the vendor relied solely upon the personal credit of the vendee, as where the day of payment is postponed, the lien does not attach. A delivery to the vendee, or his agent, divests the lien; and this whether the delivery be actual, or merely symbolic or constructive, as, by giving the vendee the key of the warehouse where the goods are stored, or by actual delivery of a part only of the goods sold under an entire contract. (*b*) If, however, the symbolic or constructive delivery be conditional, and the condition be not performed by the vendee, the vendor may retain the whole, or whatever part remains, for the price of the whole. (*c*) But where a delivery of part of the goods is in pursuance of a manifest intention to separate that part from the residue, and consequently not made in progress of, or with a view to the delivery of, the whole, the lien on the remainder will not thereby be divested. (*d*) And it is no waiver of a condition for pay-

(*a*) Hanson *v.* Meyer, 6 East, 614.

(*b*) Copeland *v.* Stein, 8 T. R. 199; Sibley *v.* Hayward, 2 H. Black. 504; Hammond *v.* Anderson, 1 B. & P., N. R. 69; Parks *v.* Hall, 2 Pick. 206. In this case a debtor had assigned goods to the plaintiff, to secure him for advances made, and given him possession of them The debtor subsequently agreed with the plaintiff to pay him in money and approved securities, and receive the goods back again. The money and securities were accordingly paid, part of the goods were actually delivered to the debtor, and arrangements made for the surrender of the balance. The debtor took possession of the balance of the goods, without the direct coöperation of the plaintiff, and they were then attached by the defendant, a sheriff, upon the suit of another creditor of the debtor. Part of the securities taken by the plaintiff having failed, he claimed to hold a lien upon the property attached, and brought an action of trespass against the defendant. The court held, that, if the first transaction amounted to a mortgage from the debtor to secure the plaintiff's advances, the payment of the money and securities revested the property in the goods in the debtor, without any redelivery of the goods; and if the first transaction was a sale and delivery of the goods, then the subsequent arrangement was a resale, and the delivery of a part was, in effect, a delivery of the whole. In either case the plaintiff had no lien upon the goods, and judgment must be given for the defendant.

(*c*) *Ex parte* Gwynne, 12 Ves. Jr. 379.

(*d*) Bunney *v.* Poyntz, 4 B. & Ad. 568; 1 Nev. & M. 229; Miles *v.* Gorton, 2 Cr. & M. 504.

ment on delivery, so as to divest the right of lien upon what remains, that the vendor merely allows the purchaser to take away a part of the goods without payment. (*e*)

Neither an agreement made by the vendor, at the time of the sale, to store for rent, or rent free, nor the giving an order for delivery from his own store, as between him and the vendee, destroys the lien. (*f*) But if the goods be in the hands of a third person, he becomes, by the delivery order from the vendor, the agent of the vendee, and his possession is that of the vendee. (*g*) If a person sell goods on credit, and the vendee subsequently deposit them with the vendor to be sold on his account, the vendor will have no lien for the vendee's debt to him. (*h*)

A vendor's lien may be distinguished from his right of stoppage in transitu by the fact of possession in the former case, and non-possession in the latter. Hence the right of stoppage, if strictly considered, is not so much a lien as a right to acquire a lien, under particular circumstances, by resuming possession of the goods before they have come to the actual possession of the insolvent vendee. The right of stoppage in transitu was originally an equitable right, and is much more modern than the vendor's right of lien, which is strictly and entirely a common-law right. (*i*) In our chapter on this subject, we have considered the question, whether the right of stoppage in transitu should be regarded as a right of rescission of the sale, or as an extension or peculiar application of the common-law lien of a vendor; and have given our reasons and authorities for decidedly preferring the latter view.

The factor's lien is both particular and general. Factors have always had a common-law lien upon the goods of their principals, coming into their possession, for the charges incidentally arising upon those goods in the course of their business. And since the case of Kruger *v.* Wilcox, decided in England in 1755, their right to a general lien for the balance due upon

(*e*) Payne *v.* Shadbolt, 1 Camp. 427; Palmer *v.* Hand, 13 Johns. 434.

(*f*) Townley *v.* Crump, 5 Nev. & M. 606, 1 Har. & W. 564.

(*g*) Miles *v.* Gorton, 2 Cr. & M. 504.

(*h*) Houghton *v.* Matthews, 3 B. & P. 485.

(*i*) Whitaker on Lien, 151; Cross, id. 2.

all goods of the principal, in their possession, has been established as resulting from the usages of trade. (*j*) Possession by the factor is, however, essential, whether the lien asserted be general or particular. (*k*) This lien not only covers money advanced, and regular charges, but also debts of the principal for which the factor is surety. The lien attaches upon the factor's becoming surety, which is regarded as the same thing as though he had lent his principal the money. (*l*) If, however, he becomes responsible for his principal without the authority or knowledge of the latter, he will have no lien upon the property in his hands for such responsibility. (*m*) The lien of a factor has always been favored by the courts as being for the interests of commerce, and the right has consequently been allowed to be carried to a very great extent. Thus, a factor who has sold under a *del credere* commission, or is in advance for the goods sold, by actual payment, is allowed to have a lien upon the

(*j*) Kruger *v.* Wilcox, Ambl. 252. In this case the Lord Chancellor, *Hardwicke*, says: "All the four merchants, both in their examination in the cause and now in court, agree that, if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account, as well as for the charges, customs, &c. paid on the account of the particular cargo."

(*k*) Cowell *v.* Simpson, 16 Ves. Jr. 280; Walker *v.* Birch, 6 T. R. 258; Baker *v.* Fuller, 21 Pick. 318; Elliot *v.* Bradbury, 23 Vt. 217; Bk. of Rochester *v.* Jones, 4 Comst. 497.

(*l*) Drinkwater *v.* Goodwin, 1 Cowp. 251; Hammonds *v.* Barkley, 2 East, 227. The defendants in this case were assignees of the estate of a bankrupt factor, to whom the testator of the plaintiffs had consigned a ship and cargo, for which the factor was largely in advance, by payment of insurance premium, ship's expenses, and by accepting bills. The testator died before the ship sailed, but the plaintiffs, as executors, upon application of the captain for instructions, confirmed her destination to the charge of the factor. The ship was sold, and the freight collected by the factor, and the proceeds were held by his assignees as a part of the assets of his estate. The plaintiffs sued for these proceeds as the property of their testator, and the defendants claimed a lien thereon for the advances made by the factor. Among the items of the defendant's claim was one acceptance for £1000, then outstanding against the bankrupt's estate; and the chief stress of the case was, as to the factor's lien attaching for this unpaid acceptance. The court decided that it did, and for such sum as the assignees should be compelled to pay upon that acceptance. Per *Grose*, C. J., in delivering the opinion of the Court of King's Bench: "The case of *Kinloch* v. *Craig* (3 T. R. 119 and 783), the authority which was relied upon to prove that the bankrupt had no lien for the acceptance which he has not paid, does not rule this case. For there Sandiman & Co. had never possession of the property on which they claimed a lien, as Fentham had in this case; and that case only determined that a person making himself liable by his acceptances did not thereby prevent the consignor's right of stopping in transitu, in case of his insolvency; and it did not decide that, when a man had in his possession the effects on the credit of which he had made his acceptances, that he might not retain those effects until he was indemnified against the liability to which he had subjected himself." Houghton *v.* Matthews, 3 B. & P. 485.

(*m*) Gurney *v.* Sharp, 4 Taunt. 242.

price in the hands of the purchaser, though he has parted with the possession of the goods. His right to retain the money in consequence of his lien, is put upon the ground of his control over the fund by the power of giving a discharge, or bringing an action. (*n*)

A factor's lien is an insurable interest, which authorizes him to insure the goods of his principal that are in his possession, for his own benefit. He has also a lien on a policy of insurance in his possession, effected by him for his principal, for his general balance; and though the principal should assign both the property and the policy, by the indorsement of a bill of lading, the indorsee will take the policy subject to the lien. (*o*) So a factor in possession of a ship, under power of attorney from the owner, to sell, has a lien upon the ship's papers in his hands, for his charges in trying to effect a sale. (*p*)

A factor's lien for advances, will not be defeated by his knowledge at the time he made his advances, that his principal was in insolvent circumstances. (*q*) Only debts due to the factor by one in the character of principal, are secured by the factor's lien; and therefore a factor is not allowed to retain the goods of his principal for a debt owing by the latter, which was contracted before the relation of principal and factor commenced between them. (*r*) The lien is not divested by taking the goods in execution by a creditor of the principal.

(*n*) Drinkwater *v.* Goodwin, 1 Cowp. 251.

(*o*) Godin *v.* L. As. Co. 1 Burr. 490.

(*p*) Maester *v.* Atkins, 5 Taunt. 381.

(*q*) Foxcroft *v.* Devonshire, 2 Burr. 931.

(*r*) Houghton *v.* Matthews, 3 B. & P. 485. The plaintiffs, assignees of a bankrupt, brought trover against the defendant, a factor, for a quantity of indigo consigned by the bankrupt to the factor for sale. The bankrupt was indebted, at the time of the consignment, for goods bought of the factor belonging to other parties, and upon his failure the factor claimed to hold the indigo as security for the debt. The relation of principal and factor had never existed between the bankrupt and the defendant, prior to the consignment of the indigo, and the factor had made no advances upon the consignment. The question, whether the general lien of a factor could attach under such circumstances, was elaborately argued before the Court of Common Bench; and it was decided that it could not, by the majority of the court, Lord *Alvanley*, C. J., being rather inclined to think that a verdict ought not to be entered for the plaintiff, though by no means prepared to say that a verdict ought to be entered for the defendant. The judgment of the court against the factor's claim was based upon two grounds, namely, that he had no such property or interest in the debt owed by the bankrupt for goods bought of the factor as would authorize a set-off against the claim made by the assignees; and, secondly, that the general lien claimed for the factor by the custom of trade, could pertain only to what concerns that trade. Sturgis *v.* Slocum, 18 Pick. 40; Mathews *v.* Menedger, 2 McLean, 145.

The possession under which the lien accrues must have been authorized and acquired *bona fide.* (*s*) No tortious possession can give a lien. Thus, possession given to a factor by a carrier by order of the principal, after the principal's bankruptcy, though the goods were shipped on the factor's account, and he had accepted bills on the faith of the shipment, gave no claim to a lien. The order of the principal was regarded by the court as tending to defeat the claim, as going to show that the carrier's possession was not that of the consignee. (*t*)

The charges for which the lien is asserted must be reasonable, and warranted by necessity, or the customary course of dealing between principals and agents. Under this head, law expenses incurred in obtaining possession of the goods, where wrongfully withheld by the carrier, have been allowed as proper. (*u*) The right to pledge goods consigned to a factor for sale, does not exist at common law; (*v*) but this right is conferred by statutes in England as well as in this country, so that the pledgee will have a valid lien upon the goods, provided he has no notice that the pledgor is not the true owner. Though, as we have already stated, a factor's lien depends upon possession, he may by special arrangements be a consignee, and thus acquire rights prior to the possession of the property; but the arrangements must amount to a specific appropriation of particular property already consigned. (*w*)

(*s*) Taylor *v.* Robinson, 2 Moore, 730; Bruce *v.* Wait, 3 Mees. & W. 15, Mur. & H. 439; *infra,* n. (*o*).

(*t*) Nicholas *v.* Clent, 3 Price, 547; and see Madden *v.* Kempster, 1 Camp. 12.

(*u*) Curtis *v.* Barcley, 5 B. & C. 141; 7 D. & R. 539.

(*v*) Graham *v.* Dyster, 6 M. & S. 1; Quieroz *v.* Trueman, 3 B. & C. 342, 5 D. & R. 192.

(*w*) Fisher *v.* Miller, 1 Bing. 150, 7 Moore, 527. The defendant, a factor, had received a consignment of a cargo of fish from a merchant who subsequently became bankrupt, with specific instructions to remit the proceeds in liquidation of another factor's account, who had advanced money to the merchant upon a distinct pledge of the proceeds of this cargo. The merchant had afterwards instructed the defendant that the proceeds of the cargo in question were not to be applied as at first directed; but the defendant, following the first instructions, remitted the proceeds to cover the advances made upon the cargo. The assignees of the bankrupt sued the defendant for the amount of these proceeds, and he defended by showing the actual appropriation of the fund by the plaintiffs' bankrupt, and the advances made by the second factor on the faith of that appropriation. The court held, that as there had been an appropriation of the cargo in question, to secure the advances, the money was rightly paid by the consignee, and gave judgment for the defendant. Mr. Justice *Park,* in his judgment concurring with the other judges, says: "A person who obtains money under an agreement, cannot afterwards go behind the back of the lender, so as to deprive him of the security stipulated for and agreed

A banker's lien is both particular and general. He has a lien upon all securities in his hands for the general balance of

on at the time of the advance; and although it is an established rule that a principal may countermand an order given to an agent to pay money, before it is actually paid over, yet, if the principal receive the sum from a third person in the first instance, and directs the agent to pay it over to him, and informs the third person that he has done so; this appears to me to be an appropriation which cannot afterwards be altered or rescinded." Anderson *v.* Clark, 2 Bing. 20. This was an action of assumpsit against the defendant, a ship-master, to recover damages for the non-delivery of a quantity of butter shipped by a merchant in Ireland, by the defendant's vessel, and consigned to the plaintiff at Liverpool. This cargo, like others before it, was shipped by the merchant to the plaintiff, to be sold on account of the shipper, and the latter had been in the habit of drawing against his shipments, and frequently in anticipation of future consignments. The plaintiff was largely in advance by his acceptances at the time the cargo in question was shipped. Upon this shipment the merchant sent the plaintiff a bill of lading and an invoice of the cargo, amounting to £592, and drew on him for £500. The plaintiff refused to accept the draft, and the shipper, by indemnifying the defendant, induced him to re-deliver the goods to him. The full court held, that though the plaintiff might not have an absolute property in the goods, he had at all events a sufficient qualified interest in them, in the way of security, to entitle him to sue on a breach of contract for non-delivery. Haile *v.* Smith, 1 B. & P. 563. A merchant of Liverpool, wishing to draw on a banking-house in London to a large amount, agreed, among other securities given, to consign goods to a mercantile house consisting of *the same partners* as the banking-house, though doing business under a different firm name. He accordingly remitted the invoice of a cargo and the bill of lading indorsed in blank, to the mercantile house, consigning the cargo for sale on his account. The cargo was prevented from leaving Liverpool by an embargo; the merchant became bankrupt, being considerably indebted to the banking-house for advances, made in pursuance of the agreement, and the assignees of the bankrupt took possession of the cargo, with the consent of the captain of the vessel. The mercantile house brought trover against the captain for the conversion of the cargo, and the Court of King's Bench *held,* that the action could be maintained. *Eyre,* C. J., in giving judgment for the court, regarded the effect of the arrangement between the parties to be a transfer of the property in the cargo, to the plaintiffs, upon a trust in which the merchant and the banking-house were concerned; that trust being, that the proceeds of the cargo, whatever they might be, should remain with the consignees, applicable to the debt of the merchant for advances made by the banking-house. Says his Lordship: "From the moment, then, that the goods were set apart for this particular purpose, why should we not hold the property in them to have been changed, it being in perfect conformity to the agreement, and such an execution thereof as the justice of the case requires? One difficulty had indeed occurred to me, namely, that if this bill of lading so indorsed, was at all events to change the property; if, of its own force, without reference to any particular agreement, it was to operate as a transfer, then, if the banking-house had become debtors to the consignor, and had become insolvent, the effects of the consignor would have gone to pay their debts. The injustice of this seemed so flagrant, that I felt great difficulty in acceding to a proposition attended with such consequences. But I see no reason why we should not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent to carry the substance of that agreement into execution. This will lead to the conclusion, that the moment the goods were put on board the vessel, and the bill of lading was indorsed and remitted to the mercantile house, the property was changed, and was to remain in their hands clothed with the trust expressed in the agreement." Bruce *v.* Wait, 3 M. & W. 15, Mur. & Hurl. 339. In this case there was not an appropriation by the owner of a specific cargo already consigned, nor were the bills of lading remitted to the factor prior to the arrival; so that, though the latter got possession of the cargo, yet, as it was against the intention of the owner, he acquired no lien for his advances. The facts were as follows: Coombe, a mer

the party owning and depositing them with him; and an assumption of some of the securities to himself, by discounting

chant in Ireland, was in the habit of consigning cargoes of grain to the plaintiff, a corn factor in Bristol, England; and the plaintiff was in the habit of accepting bills on the faith of the cargoes, and selling the goods on account of Coombe. On the 12th of December, 1836, Coombe wrote to plaintiff, he intended to ship a cargo of oats to him by first opportunity, and might, probably, draw on him in anticipation of the shipment. On the 20th December he wrote, that he had drawn for £550, in conformity with his previous intimation, and hoped in a few days to ship him a cargo of good oats. The draft was accepted by the plaintiff, and returned to Coombe, who again wrote on the 5th of January, that he had engaged a vessel, which would commence loading in a day or two, and asking plaintiff to get £600 insured on the cargo. Another letter followed, stating that the loading was nearly completed, and then one dated the 23d of January, stating that he was under the necessity of suspending payment. On the same day, Coombe sent the bill of lading of the oats to another corn-factor of Bristol, named Harris, with a letter requesting him to sell the cargo on his (Coombe's) account; but saying nothing of his previous engagement with the plaintiff, or of the embarrassed state of his affairs. Upon receipt of the bill of lading, Harris sent it to the plaintiff, and requested the latter to act for him. The plaintiff received the cargo, and paid the freight upon it. The defendants, creditors of Coombe, attached the corn for debt, and took possession of it. The plaintiff sued them in trover; but the Court of Exchequer Chamber held, that he could not maintain the action. In the opinion of the court no property had been transferred up to the time when the cargo was put into the plaintiff's hands by Harris, the transaction between Coombe and the plaintiff resting merely in agreement; and the plaintiff subsequently held as the agent of Harris, and not of Coombe. Desha *v.* Pope, 6 Ala. 691; Dow *v.* Greene, 16 Barb. 72. The plaintiffs were commission-merchants in the city of New York, and had agreed with A., a merchant of Rochester, to advance a certain rate per bushel on corn to be consigned to them by him, upon the deposit of the shipping bills of the cargoes with their agent at Rochester, and the agent's approval on the drafts to be drawn on them by A for the advances. Upon this, A procured shipping bills of four cargoes of corn, laden on board canal boats at Buffalo, and presented them to the plaintiff's agent. These bills stated that the corn was shipped on the account of A, and consigned to the plaintiffs. Drafts for the stipulated amount of the advance were drawn by A upon the plaintiffs, approved by the indorsement of the agent, duly accepted by them, and paid at maturity. A had procured the shipping bills from the owners of the corn at Buffalo (who were also the proprietors of the canal-boat line by which the corn was shipped), by the fraudulent practice of an agent in his employ, who had negotiated with the owners for the purchase of the corn, and for its shipment to New York by their boats; the shipping bills being signed by their clerk in their names. The plaintiffs were entirely ignorant of the fraud, and accepted the drafts in good faith. A got the drafts discounted as soon as they were indorsed by the agent of the plaintiffs, and absconded with the proceeds, leaving the owners of the corn unpaid. As soon as the owners discovered that the shipping bills had been delivered by their clerk without payment for the corn being made, they telegraphed to the plaintiffs at New York, that the cargoes had not been paid for by A, and required them to hold the corn for their account. Previously to the receipt of this message, the plaintiffs had received the shipping bills from their agent, and accepted the drafts. Upon hearing that A had absconded, the owners sold the corn, then on its passage, to other parties, giving them new shipping bills signed by themselves and indorsed by the respective captains of the boats. By these new bills the corn was to be delivered to the agent of these new parties, at Albany. This agent sold and delivered the corn to the defendants, at Albany. The plaintiffs demanded the corn of the defendants, who refused to give it up, claiming it as their own property. This action was brought to recover possession. At the trial at the Albany circuit, in October, 1849, a verdict was found for the defendants, and the case was carried by appeal to the General Term of the Supreme Court for the 3d Judicial District. At the hearing on the

them, will not invalidate the lien upon the others. (*x*) And he may receive a pledge of negotiable securities without indorse-

appeal, the court decided, that the only question which should have been submitted to the jury, was, whether the clerk of the owners and transportation proprietors, had authority to sign the shipping-bills; and that the jury should have been instructed to find for the plaintiff or the defendants, as they should determine this question. Upon the question of law, whether the plaintiffs had any property in the cargoes, the court held, that, assuming the clerk's authority to sign the shipping-bills, the plaintiffs were by those documents clothed with *prima facie* evidence of ownership; that the vendors of the corn thus made themselves bailees, either of the shipper, A, or of the consignees, the plaintiffs, according to the right of property between those two parties; that as between the latter, the plaintiffs, when they received the bills consigning the goods to them, and accepted the drafts of the shipper upon the credit of the consignment, became factors *del credere*, and acquired an interest in the corn which could not be defeated by the vendor nor by the vendee; that the consignment, and the advances made upon the credit of the consignment, vested in the plaintiffs the right of property, and the constructive possession. Davis *v.* Bradley, 28 Vt. 118. The plaintiffs were commission-merchants in Boston; and, in pursuance of a general business arrangement to receive consignments of wool from B. & H. Boynton, a business firm in Hinesburgh, Vermont, and upon the receipt of the invoices and forwarding receipts of any parcels of wool, to accept drafts to the amount of two-thirds or three-quarters of the value of the goods so sent, they had accepted drafts drawn against several parcels which had been intrusted by the Boyntons to the defendants, to be forwarded to them. The

(*x*) Davis *v.* Browsher, 5 T. R. 488; Scott *v.* Franklin, 15 East, 428; Bk. of Metrop. *v.* N. E. Bk. 1 How. 234; 17 Pet. 174. In this case the court say, in reference to the general doctrine of the banker's lien, *Taney*, C. J., giving the opinion of the court: "It has long been settled, that wherever a banker has advanced money to another, he has a lien upon all the paper securities which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement." The case itself is one of some interest, as involving the question of lien upon securities that are deposited merely for collection. The Bank of the Metropolis at Washington, D. C., and the Commonwealth Bank of Boston, having for a long time had a system of mutual collections, whereby each party received from the other, notes and other commercial paper for collection, which were treated as the property of the bank sending it to the other, the proceeds being credited and the costs and expenses charged to the bank so sending, and the accounts between the two institutions, from time to time adjusted upon these principles. The New England Bank of Boston, in the latter part of the year 1837, intrusted a number of drafts and notes about to fall due, and payable in the vicinity of Washington, to the Commonwealth Bank, for collection, they being duly indorsed by the cashier of the New England Bank, payable to the order of the cashier of the Commonweath Bank. The latter officer indorsed them payable to the order of the cashier of the Bank of the Metropolis, and sent them forward to that bank for collection, without any explanation as to the ownership of them. In the month of January 1838, the Commonwealth Bank failed, owing the Bank of the Metropolis the sum of $2,900, on account of collections made for that bank, in Boston and vicinity. The New England Bank claimed the amount of the proceeds of the paper collected by the Bank of the Metropolis, which claim the latter bank resisted, on the ground that it had a lien upon the paper and its proceeds, for the amount owed it by the Commonwealth Bank. The Circuit Court for the District of Columbia, decided against the Bank of the Metropolis, and the case was carried to the Supreme Court on writ of error, where the judgment of the Circuit Court was reversed, and the lien of the Bank of the Metropolis, sustained. The court held, that, by the indorsement of the notes and bills in such a form as to make them *prima facie* the property of the Commonwealth Bank, the New England Bank contributed to give to the corporation which proved insolvent, credit with the plaintiff in error, and to induce the misplaced confidence which had occasioned the loss in question.

ment by the pledgor. (*y*) Where a negotiable note is indorsed to a banker by a payee, as collateral security for one only of several demands for which he is liable, the banker has no lien on such note as security for any other demand against the indorser. (*z*)

defendants were forwarding merchants at Burlington, and had given receipts for the wool in question, setting forth that it was to be shipped to the plaintiffs, which receipts were forwarded by the shippers to the plaintiffs. Subsequently to giving these receipts, the defendants caused the wool to be attached as the property of the Boyntons, taken on execution and sold, for claims held by them against the Boyntons. The plaintiffs sued in trover for thirty-one bales thus withheld from them. A verdict was found for the plaintiffs, and the defendants carried the case up to the Supreme Court, upon exceptions, that the plaintiffs did not have constructive possession upon the alleged state of facts. The opinion of the Supreme Court was given by *Redfield*, C. J., and fully sustained the ruling of the court below. Upon the requisites to give a factor a lien upon goods consigned, but not actually received, the Chief Justice says: "These incidents must occur. First; the consignment must be in terms to the factor. That was so in the present case, as much as if a formal bill of lading had been made in his name, omitting assigns. So that the undertaking of Bradley & Co. is, in terms, to forward them to the plaintiffs, and for their benefit. They are, upon the face of the forwarder's receipt (which is in fact a bill of lading, as far as one can properly exist in these inland transactions), the party entitled to sue, and the instrument binds the defendants to forward the goods to the plaintiffs, and equally binds the carrier to deliver them, and *prima facie*, the plaintiffs are the only party entitled to receive the goods, upon the face of the transaction. B. & H. Boynton had parted with their control over them. Second; but to the conclusiveness of such a contract, against creditors and subsequent purchasers, it is requisite that the consignee should have made advances or acceptances, upon the faith of these particular consignments. That too, we think, is shown by the testimony and found by the jury. In addition to this, which seems commonly sufficient to give the factor a lien, and is all that existed in Holbrook *v.* Wight, 24 Wend. 169, and which seems to us to be a sensible, and we see no reason to doubt, a sound case; in addition to all this, the present case does contain what all the cases and all the books upon this subject, so far as I can learn, have ever regarded as a symbolical delivery of the goods, the sending to plaintiffs the shipper's receipt, which is in effect and in terms a consignment, or bill of lading to the plaintiffs." — "The case of Holbrook *v.* Wight, 24 Wend. 168, is a full authority for the decision of the county court in this case. There the plaintiffs were commission-merchants in New York, and their correspondents, manufacturers at Middlebury, Vermont. They advised the plaintiffs of the goods being in readiness to be forwarded to them, and that they would be sent to a house in Troy, with instructions to forward them to the plaintiffs upon the opening of navigation. The consignors about this time drew upon the plaintiffs for $6,000, at different dates, which the jury found, as they did in the present case, the plaintiffs accepted, relying upon the consignments. The consignors, being pressed by other creditors, made a different disposition of the goods, while remaining in the hands of the forwarder at Troy, and ordered them into other hands, and to be delivered to other parties. But the court held, that the lien of the first consignees was perfected, and the subsequent disposition of the property could not defeat their rights. In this case there was nothing like a symbolical delivery, which does exist in most of the English cases upon this point, and equally in the present case, and which seems to be regarded by most jurists and merchants, as an essential element in a consignment to a factor, in order to perfect his lien for advances made upon the faith of such consignment, and which fact is regarded as amounting, in all cases, to a substantial change both of title and possession."

(*y*) *Ex parte* Hustler, 3 Mad. 117.

(*z*) Neponset Bk. *v.* Leland, 5 Met. 259.

It seems that one who is a bank director may confer a valid lien upon negotiable paper, intrusted to him by another for the purpose of getting it discounted for that person's benefit, but fraudulently pledged to the bank by him, as security for his own indebtedness; the bank not being affected by a director's knowledge in a transaction where he does not act in his official capacity. (*zz*)

An insurance broker's lien upon a policy of insurace effected by him, extends not only to his demand for the premium paid by him on that particular policy, but also to his general claim on account of premiums and other insurance payments, against the party for whose benefit the policy is effected; and to the money which he may receive on account of a loss under the policy. (*a*) But it is not available for the general balance due him by one who employs him to effect that insurance, where he knows that the employer is the agent of another party for that transaction, even though a larger balance be due from that party to the agent. (*b*)

It was also decided in a later case, that where the insurance broker who is employed by an agent, is falsely informed by his employer, that the property is his own, and acts upon that information in good faith, his general lien for the balance due him by the fraudulent agent, will not attach, as against the true owner. (*c*) But later authorities reverse this decision, and give

(*zz*) Wash. Bank *v.* Lewis, 22 Pick. 24.

(*a*) Whitehead *v.* Vaughan, 1 Cooke, 566. Vaughan, an insurance broker, having procured insurance for a merchant, and having transferred the policy to his employer, subsequently obtained possession of the same for the ostensible purpose of collecting a partial loss which had accrued under it, but really with a view to holding it as security for the general balance which his employer owed him on account of premiums. Before the partial loss was adjusted the merchant became bankrupt; and after the broker had collected the amount due on the policy, the assignees of the bankrupt demanded the money. The defendant set off what he had received, in the general account with the bankrupt, and paid the balance into court. Upon the question whether the defendant was entitled to this set-off, it was argued that the debt became due from the defendant to the assignees upon his receipt of the amount from the underwriters, which was after the bankruptcy, and therefore could not be set off; that the defendant had no lien but for the premium on that particular policy; that having once parted with the policy, he lost his lien upon it, which did not revive by his subsequently regaining possession. Lord *Mansfield* decided that the money received was an *item* of the mutual account; that there was a general lien; and that the lien revived when the policy again came into the hands of the broker; and *Buller*, J., concurred in the opinion; saying that he considered it a settled point that there was a general lien on policies in the hands of the insurance broker. McKenzie *v.* Nevins, 9 Shepl. 138.

(*b*) Snook *v.* Davidson, 2 Camp. 218.

(*c*) Lanyon *v.* Blanchard, 2 Camp. 597; and see Richardson *v.* Goss, 3 B. & P. 119; Pultney *v.* Kymer, 3 Esp. 182.

the broker his general lien against the owner for the balance due by the agent. (*d*) We are inclined to question the justice of the principle involved in these later decisions; for it virtually gives to a creditor a lien upon property in which the debtor has no interest, for an expenditure not made upon that property, and makes the owner thereof responsible for debts of his agent, that were not contracted for his benefit, or by his authority. As the general lien here asserted, results from the usage of trade, to sustain this principle, it would be necessary to show that custom authorizes an agent to commit his principal beyond the extent of the authority given to him, by fraud. Such a custom, if shown to exist, would doubtless be pronounced by a court, to be unreasonable and unjust, and therefore bad in law; as in the case of warehousemen, claiming by custom to hold the goods of third parties, for the debts of those depositing them. (*e*) The opinion expressed by the Supreme Court of Massachusetts, as to the want of authority in an agent effecting a policy in his own name, to set off against his own debt for premiums, the loss due from the underwriter to his principal, upon that policy, seems to sustain the view we have here taken. (*f*)

(*d*) Mann *v.* Forrester, 4 Camp. 60; Westwood *v.* Bell, 4 Camp. 349.

(*e*) Leuckhart *v.* Cooper, 2 Hodg. 150; 3 Bing. N. C. 99.

(*f*) Moody *v.* Webster, 3 Pick. 428. This case was one growing out of the Spanish indemnity treaty of 1819, for spoliations on American commerce. The defendant had collected a portion of the indemnity money, as compensation for losses paid by an insurance broker, the policies and deeds of abandonment, retained by the broker at the time the losses were paid by him to the insured, being used before the commission for the purpose of establishing the claim for indemnity for these losses. The underwriter with whom the broker had effected the insurances in question, had subsequently become bankrupt, being indebted to the broker upon losses paid for him by the latter, to a much larger amount than the broker owed him for premiums. The broker did not prove his claim against the bankrupt estate, but died retaining the documents which evidenced the payments he had made for account of the bankrupt underwriter. The assignees of the underwriter laid claim to the indemnity money in the hands of the defendant, as part of the bankrupt's estate, and the defendant claimed to hold it for the executors of the deceased broker, by virtue of the broker's general lien upon policies in his hands and their proceeds, to indemnify him for monies paid by him on account thereof. The court were clearly of opinion, that if the money in question had been received by the broker for premiums on policies, procured by him from the underwriter, he would have been entitled to deduct therefrom the amount of losses paid by him for the underwriter, and would have been liable only for the balance. This right of set-off the court regarded as resulting from the implication of the law touching this subject, and as not requiring any express agreement. Viewing the indemnity money, not as a gratuity, belonging to the former owners of the vessels, but as a satisfaction for illegal capture, the court considered it as of the nature of salvage, and

A wharfinger's lien is both particular and general. His rights are regarded as coextensive with those of a factor. (*g*) By admiralty law, the wharfinger's lien on a foreign ship has priority over the bottomry interest. (*h*) But this lien does not extend by common law or by usage, to goods not actually landed on the wharf, though the vessel be fastened to the wharf, and unloaded in that situation. (*i*)

A warehouse-man's lien extends to all demands for storage and expenses paid, which he may have against the owner who deposits the goods with him. (*j*) He has also a particular lien upon the goods for the charges thereon, where they are deposited by an agent of the owner; but no general lien for the balance due from such agent. (*k*) No lien is acquired where the property is deposited without the sanction of the owner, express or implied; and if he claims to retain the property on a ground inconsistent with the right, it will operate as a waiver of the lien. (*l*)

therefore in the hands of the broker or of his legal representatives, as properly subject to his lien. As to the rights of an insurance broker, the court say: "Where he acts under a *del credere* commission, he may be permitted to set off losses against the claim of the underwriter for premiums, which he would not be allowed to do, if he were acting as a broker without such a commission; because under such a commission he procures policies for his principals in his own name, although as agent, and he is considered, as between the underwriters and himself, as the owner of the policies. And this arises from his increased liability to the assured for the losses. He is, in such cases, therefore, permitted to set off losses, in the same manner as he would be if he were the sole proprietor of the property and the policies. He is also liable to the underwriter for the premiums in such cases. The underwriter and the assured, in short, treat with the broker, having such a commission, as with a principal. But where one effects policies as agent, in his own name, without such a commission and such liabilities, and a loss happens, it belongs exclusively to the principal, and the broker cannot set it off against the premiums claimed from him by the underwriter, unless he should have paid it pursuant to the authority given to him by the underwriter. From thenceforward it would become an item in their mutual accounts."

(*g*) Rex *v.* Humphrey, 1 M'Clel. & Y. 188; Spears *v.* Hartley, 3 Esp. 81.

(*h*) *Ex parte* Lewis, 2 Gall. 483.

(*i*) Seyds *v.* Hay, 4 T. R. 260.

(*j*) Buxton *v.* Baughan, 6 Car. & P. 674; Scott *v.* Jester, 8 Eng. (Ark.), 437; Lowe *v.* Martin, 18 Ill. 286.

(*k*) Leuckhart *v.* Cooper, 2 Hodg. 150, 3 Bing. N. C. 99.

(*l*) Buxton *v.* Baughan, 6 C. & P. 674. The plaintiff sent his carriage to be painted, paying the painter beforehand the full price for the work. The painter, without any authority from the plaintiff, stored the carriage on the premises of the defendant, under an agreement that it was to remain for a fortnight without charge, but that if it stood longer, hire should be charged. The painter did not paint the carriage, and never removed it. At the end of several months, the plaintiff discovered where the carriage was stored, and subsequently demanded it of the defendant. The latter refused to deliver it, unless the owner paid his charge for standing. This the owner refused to do, and brought an action of trover against the defendant. The Court of Exchequer held, that the person to whom the carriage was intrusted for painting, had no right to make a bargain for the storage, unless

An attorney's lien for his costs extends to all papers and money of his client which come into his hands in his professional capacity, for the purposes of business, whether they come into his hands in the particular cause, or on the particular occasion in which his demand arises, or not. (*m*) But it is only when he has in his possession the instrument on which his client's right to the money paid into court rests, that he has a right of general lien on the fund recovered. (*n*) He has also a lien upon judgments obtained for his client; and the courts will grant an order to stop the client from receiving the money recovered, (*o*) until the attorney's bill is paid. And if defendant's attorney pay the amount of a judgment to the plaintiff, after notice from the attorney of the latter not to do so, because his bill is not satisfied, he will be liable to the plaintiff's attorney for the amount of his lien for bill against the plaintiff. (*p*) But the lien on the cause for his fees does not attach until the judgment is entered. Therefore, where in a case reserved, after the opinion of the court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term, and before the judgment was actually entered, paid the whole amount to the assignee; it was held that the attorney's lien was thereby defeated. (*q*) He has also a lien on money levied by a sheriff under an execution, and is entitled to have it paid over to him, notwithstanding notice to the officer to retain it, and of a motion to set aside the judgment for irregularity. (*r*)

expressly authorized by the owner; and not having such authority, his act could confer no lien in favor of the defendant. Judgment was accordingly given for the plaintiff. Boardman *v.* Sill, 1 Camp. 410, n.

(*m*) Stevenson *v.* Blakelock, 1 M. & S. 535; St. John *v.* Diffendorf, 12 Wend. 261; Dennett *v.* Cutts, 11 N. H. 163; Cage *v.* Wilkinson, 3 Sm. & Marsh. 214; Walker *v.* Sargent, 14 Vt. 247; Christy *v.* Douglas, Wright, 485; Reed *v.* Bostick, 6 Humph. 321; McDonald *v.* Napier, 14 Geo. 89; Kinsey *v.* Stewart, 14 Tex. 457.

(*n*) Lann *v.* Church, 4 Mad. 391.

(*o*) Welsh *v.* Hole, Doug. 238; Wilkins *v.* Carmichael, Doug. 104; Bradt *v.* Koon, 4 Cow. 416; *Ex parte* Plitt, 2 Wallace, Jr. 453; Fowler *v.* Morrill, 8 Tex. 153; Young *v.* Dearborn, 7 Fost. (N. H.), 324; Creighton *v.* Ingersoll, 20 Barb. 541; Collins *v.* Hathaway, Olcott, Adm. 176; Hough *v.* Edwards, 37 Eng. L. & Eq. 470.

(*p*) Welsh *v.* Hole, Doug. 238; Swain *v.* Senet, 2 B. & P. (N. R.), 99; Power *v.* Kent, 1 Cow. 172; Ward *v.* Wardsworth, 1 E. D. Smith, 198.

(*q*) Potter *v.* Mayo, 3 Greenl. 34; Getchell *v.* Clark, 5 Mass. 309; Foot *v.* Tewksbury, 2 Vt. 97; Hutchinson *v.* Pettes, 18 Vt. 614; Sweet *v.* Bartlett, 4 Sandf. (S. C.), 661.

(*r*) Griffin *v.* Eyles, 1 H. Bl. 122.

His lien also covers the amount of an award in favor of his client; (*s*) and if the amount of an award or judgment be paid by the defendant to the plaintiff, after notice to pay over to the attorney, or collusively discharged, he may recover the amount of the defendant. (*t*) Upon the papers of a third person left with the attorney by his client, the latter has only a special lien for the expenses of that matter, and he cannot retain them for his client's general balance. He cannot acquire from his client a lien of a higher nature than the interest which the client himself has in the papers. (*u*) But his lien holds good against the assignees of his client, upon all papers of the latter which come into his hands before the bankruptcy. (*v*) If papers are delivered to an attorney upon a special agreement, or for a particular purpose upon a special trust, he cannot retain them for a general lien, or even for the money due in that very business. (*w*)

The incapacity of a bankrupt to give a lien, exists as well in reference to his dealings with an attorney as with other parties; and the latter has no lien upon the papers and proceedings in his custody as solicitor, under a fiat in bankruptcy. (*x*)

Formerly, some diversity of practice obtained in the different courts in England, as to allowing a set-off of damages or costs between parties litigant, to defeat an attorney's lien upon the

(*s*) Omerod *v.* Tate, 1 East, 464; Hutchinson *v.* Howard, 15 Vt. 544; Loyd *v.* Mansell, 16 E. L. & Eq. 211.

(*t*) Cowell *v.* Betterley, 10 Bing. 432; 2 Dow, P. C. 780; Eisdell *v.* Coningham, 4 Hurl. & Nor. 871; Pinder *v.* Morris, 3 Caines, 165; Martin *v.* Hawkes, 15 Johns. 405; Ten Broeck *v.* De Witt, 10 Wend. 617. If there be a settlement between the parties, without notice from the attorney, the defendant will not be liable. 2 N. H. 541. In Missouri, a defendant paying to plaintiff with notice from the attorney, is not liable. Frissel *v.* Haile, 18 Mo. 18; and it is the same in Indiana; Hall *v.* Brinkley, 10 Ind. 102. No lien on a judgment exists in the former state, and no general lien in the latter.

(*u*) Pelly *v.* Wathen, 9 Eng. L. & Eq. 61; Francis *v.* Francis, 35 Eng. L. & Eq. 114. As an attorney's lien is only coextensive with the rights of his client, he is bound to produce a deed on which he has a lien for his costs, for the benefit of third parties, if his client would be bound to produce it. Hope *v.* Liddell, 31 Eng. L. & Eq. 388.

(*v*) Hollis *v.* Claridge, 4 Taunt. 807; *Ex parte* Bush, 7 Vin. Abg. 74. An attorney had been employed by one who became bankrupt. The assignees petitioned in chancery to have up the papers, and that the attorney might come in for his demands *pari passu* with other creditors. By the Lord *Chancellor:* "The attorney hath a lien upon the papers in the same manner against assignees as against the bankrupt, and though it doth not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law; but as to papers received after the bankruptcy, they cannot be retained." Whether an attorney has any lien on papers, the property of third persons, is considered a doubtful point in 1 Bac. Abg. 503, tit. Atty. F.

(*w*) Lawson *v.* Dickinson, 8 Mod. 306.

(*x*) *Ex parte* Lee, 2 Ves. Jr. 285; *Ex parte* Shaw, 1 Gly. & J 124

whole amount awarded in favor of his client; but, by the rules adopted for the government of the courts, in the year 1832, the practice was made uniform; and at the present time no set-off of damages or costs is allowed, to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought, except as to interlocutory costs in the same suit. (*y*)

In the different States of the Union, the practice of allowing set-off of judgments, varies; in some of them it is subject to the attorney's lien in the cause, and in others it is not. In Maine and Massachusetts, where the attorney's lien is regulated by statute, no set-off of judgments or executions is allowed to defeat that lien. (*z*)

There are several kinds of lien known as maritime liens, such as those of salvors, seamen, ship-masters and owners, ship-carpenters, pilots, and Bottomry and Respondentia, which are sufficiently presented in the chapter upon Shipping, and therefore need not be considered here.

SECTION IV.

OF LIENS BY CONTRACT.

The class of liens arising by contract, though a very large one, and including transactions for security or indemnity in almost every branch of business, is very well represented by the common occurrence of a pawn or pledge. This is a lien created by the owner of personal property, by the mere delivery of it to another, upon an express or implied understanding that it shall be retained as security for an existing or future debt. This branch of the law of lien will, in this chapter, be confined to a brief view of the rights and duties of the parties to the pledge, as the general law of pledge is fully stated in the chapter on Bailment.

(*y*) *Regulæ Generales*, 3 B. & Ad. 388.

(*z*) Rider *v.* Ocean Ins. Co. 20 Pick. 259; Little *v.* Rogers, 2 Met. 478; Hooper *v.* Brundage, 9 Shepl. 460; Baker *v.* Cook, 11 Mass. 236; Gammon *v.* Chandler, 17 Shepl. 152.

A pledgee's lien being one by agreement, may be either particular or general, according to the terms or circumstances of the express or implied contract upon which it is founded. (*a*) The possession necessary in order to the enforcement of this lien, may be either actual, or constructive; and for this purpose a delivery to a servant of the pledgee is effective. (*b*) Unless there be an express stipulation to the contrary, the pledgee has a right to sell the property upon the default of the pledgor to pay. If he sell, he may be held to account for the surplus to the pledgor, and will hold him for the deficiency. (*c*) The pledgee's right to sell is however usually regulated by statute. If a pledgor, as he may do, subsequently assign his property in the pledge, the assignee will have, it is said, the same rights as the pledgor, both at law and in equity. In this respect a pledge differs essentially from a mortgage; (*d*) for an assignee of an equity of redemption in a thing mortgaged, has no rights at common law. (*e*) As the property pledged is merely a collateral security for the payment of a claim, and not a liquidation of it, the pledgee may sue at law for the recovery of his demand, without prejudice to his lien. (*f*)

A pledge of partnership property by a partner, without fraud

(*a*) Hammonds *v*. Barclay, 2 East, 227; *Ex parte* Ockenden, 1 Atk. 235; Demainbury *v*. Metcalf, Prec. in Ch. 419, 2 Vern. 691.

(*b*) Falkner *v*. Case, 1 Bro. C. C. 125; Reeves *v*. Capper, 5 Bing. N. C. 136.

(*c*) Walter *v*. Smith, 5 B. & Ald. 439. The plaintiff had pledged a gold watch and trinkets, with the defendant, a pawnbroker at Bristol in England, and did not require them to be returned within the statute time of a year and a day, after which goods may, by the statute, be deemed forfeited, and the pawnbroker is authorized to sell. After the time had elapsed, the goods being still in possession of the defendant, the plaintiff tendered the full sum due on the pledge and demanded his property. The defendant then refused to return the articles, because the year had expired, and subsequently sold them at auction, the plaintiff becoming the purchaser. The plaintiff sued the pawnbroker in trover, and the question came before the Court of King's Bench, whether by the expiration of the time, the pawner had lost all right to his property. The court decided, that, as the same statute which declared that goods not redeemed in time should be deemed forfeited, also recognized that the surplus arising from a sale of the property belonged to the pawner; it could not be considered that he absolutely lost all right by suffering the time of redemption to expire; and that, as the pawnbroker could only retain, from the proceeds of the sale, the full amount of his claim, if that amount were tendered to him before the sale, he would get just what the law intended he should have, and therefore could not refuse it and insist upon selling. Judgment was accordingly given for the plaintiff. Kemp *v*. Westbrook, 1 Ves. 278; Pothenier *v*. Dawson, Holt, 383; Lockwood *v*. Ewer, 9 Mod. 275; S. Sea Co. *v*. Duncomb, 2 Strange, 919. And see 1 Smith, Ld. Cas. 100.

(*d*) Kemp *v*. Westbrook, 1 Ves. 278.

(*e*) 1 Smith's Ld. Cases, 100.

(*f*) Bac. Abg. Bailm. B; Anon. 12 Mod. 564, case 951.

or collusion on the part of the pledgee, will give a valid lien as against the other partners. This rule applies as well to particular partnership operations as to general partnership; nor will the lien be restricted to the particular share or interest to which the pledgor is entitled. (*g*)

A pledgee acquires no lien, if the transaction takes place within the time limited by the bankrupt laws for rendering invalid the acts of one who subsequently becomes a bankrupt, in the disposition of his goods. (*h*)

If property be pledged to secure repayment of an usurious loan, the lien will not cover the part of the debt that is usurious. (*i*)

A pledgee acquires no lien upon goods pledged without authority of the owner, though the want of title in the pledgor be unknown to him when he receives the pledge. (*j*) But as to pledges of bank-notes, negotiable securities indorsed, and other representatives of money, the pledgee who takes them in good faith, will acquire a lien, whether the title be in the pledgor

(*g*) Reid *v.* Hollingshead, 4 B. & C. 867; 7 D. & R. 444. The plaintiffs, merchants in London, directed B, a broker in Liverpool, to purchase 1,000 bales of cotton, B to be allowed one-third interest therein, acting in the business free of commission. These terms were assented to by B, and the cotton was purchased in his own name, stored in rooms rented by him, and paid for by drafts drawn upon the plaintiffs, which were duly accepted and paid. All these transactions were known and approved by the plaintiffs, and in the correspondence between them and B, the purchase was in all cases spoken of by both parties, as a joint purchase and speculation. Policies of insurance were procured by B, and transmitted to the plaintiffs. When it became advisable to sell, B disposed of various lots, and remitted the proceeds to the plaintiffs. One lot of 200 bales he stored with the defendants, who were cotton-brokers, for them to sell, and subsequently received large advances from them upon pledge of the cotton stored with them; but this transaction was effected without the knowledge of the plaintiffs. Nor had the defendants any knowledge that any party besides B, was interested in the cotton. B subsequently became bankrupt, owing the plaintiffs largely, and indebted to the defendants in a greater amount than the value of the 200 bales stored with, and pledged to them. The plaintiffs sued the defendants in trover to recover two-thirds of these 200 bales. The plaintiffs contended that B had no right to pledge the cotton, as he had no interest therein, but only in the profit and loss to arise from the sale. The defendants, on the contrary, contended that he was a partner in the operation, and that his interest covered the property as well as the profit and loss. The Court of King's Bench held, that the transactions between B and the plaintiffs made him a partner in interest in the goods, and that a pledge of the whole made by him, without fraud or collusion on the part of the pawnee, gave to the latter a right to hold the goods against the plaintiffs. Judgment was accordingly given for the defendants Raba *v.* Ryland, 1 Gow, N. P. C. 132; Tupper *v.* Haythorn, 1 Gow, N. P. C. 135.

(*h*) Wilson *v.* Balfour, 4 Camp. 579.

(*i*) Astley *v.* Reynolds, 2 Str. 915; Fitzroy *v.* Gwillim, 1 T. R. 153.

(*j*) Daubigny *v.* Duval, 5 T. R. 604; Packer *v.* Gillies, cited 2 Camp. 336, n.

or not. (*k*) And goods obtained by false pretences are subject to the pledgee's lien, because the property is in the pledgor. (*l*)

The pledgee may assign his interest in the property to a third person, with a delivery of the property itself, and the assignee can hold it for the debt so assigned. (*m*) And in a case where a pledgee had pledged the goods for a larger sum than was owed to him, the time for redemption by the owner having expired, a court of equity would not decree a restoration of the property by the second pledgee, to the owner, until the latter paid him the full amount of his claim against the second pledgor. (*n*) It will be observed, that in this case the owner had no remedy at law, the time of legal redemption having elapsed before the first pledgee parted with the goods, and that the decree in equity was framed to prevent injury to an innocent third party. (*o*)

Upon tender of the amount by the pledgee the lien is immediately divested, and trover may be maintained by the pledgor if the pledgee refuses to restore the property. (*p*)

(*k*) Anon. 1 Salk. 126, case 5; Miller *v.* Race, 1 Burr. 452; Solomons *v.* Bk. of Eng. 13 East, 135, n. (*a*).

(*l*) Parker *v.* Patrick, 5 T. R. 175. This was an action of trover, and it appeared that the goods in question had been obtained from the defendant by false pretences, and afterwards pawned by the obtainer to the plaintiff for a valuable consideration, without notice of the fraud. The pawner had been convicted of the fraud by the defendant, on which the latter got possession of the goods again, and this action was brought by the plaintiff, the pawnbroker, to recover them from the defendant. The defendant's counsel pressed for a non-suit, contending that the case should be considered the same as if the goods had been feloniously stolen from the defendant; and that the plaintiff, deriving title through a fraud, though himself innocent of it, was not entitled to recover against the defendant, the true owner. But the Court of King's Bench held, that this case was distinguishable from a felony; for there it was by positive statute that the owner, in case he prosecutes the offender to a conviction, is entitled to restitution; and that the statute did not extend to this case where the goods were obtained from the defendant by fraud. Judgment was therefore given for the plaintiff. And see Kingsford *v.* Merry, 1 Hurl. & Nor., reversing same case in 11 Exch. 577. Mowrey *v.* Walsh, 8 Cow. 238; Caldwell *v.* Bartlett, 3 Duer, 341; Wood *v.* Yeatman, 15 B. Mon. 270.

(*m*) Kemp *v.* Westbrook, 1 Ves. 278; Walter *v.* Smith, 5 B. & Ald. 439.

(*n*) Demainbray *v.* Metcalf, Prec. in C. 419.

(*o*) Whitaker on Lien, 140, n. (*p*).

(*p*) Vin. Abg. tit. Pawn, (E); Anon. 2 Salk. 522; Parks *v.* Hall, 2 Pick, 206; Walter *v.* Smith, 5 B. & Ald. 439.

SECTION V.

OF LIENS BY STATUTE.

We come next to consider liens or rights in the nature of lien, acquired by process of law, and those imposed by statute, for the protection of the claims of the government. An attachment on mesne process does not exactly correspond to a lien, either in the sense of the common law, or of maritime law, or of equity. It is only a contingent conditional charge until the judgment and levy. (*q*) Goods attached are in the custody of the law for the benefit of all parties concerned, and the plaintiff has not a lien on them. (*r*) An officer loses his claim upon goods attached by him, if he leaves them in the hands of a receiptor, and the latter delivers them to the debtor. They may be disposed of by the debtor, or taken from him again on a new attachment. (*s*) A judgment lien, binding the present and future real property of the debtor, is a creation of statute law, and has no other existence. Such a lien cannot survive the law which created it, and it must be created by the government under whose laws the judgment is rendered. This consideration becomes of importance in the courts of this country, owing to the independent powers of the several States, and of the general government, in respect to the subject of legal remedies. Thus, a State may determine the effect as to liens of the judgments of its own courts, but not that of judgments of the courts of the United States; and the same limitation applies as to the legislation of Congress. (*t*)

A general lien by judgment on land, does not constitute, *per se*, a property in the land itself, but only gives a right to levy on the same, to the exclusion of adverse interests subsequent to the judgment; and such levy when made, relates back to the

(*q*) *Ex parte* Foster, 2 Story, 131.
(*r*) Melville *v.* Brown, 1 Harr. 363.
(*s*) Robinson *v.* Mansfield, 13 Pick. 139.
(*t*) Corwin *v.* Benham, 2 Ohio (N. S.), 36.

time of the judgment. (*u*) Among other liens provided for by statute, is that upon lands for the payment of taxes, assessed by government upon the owners thereof. In the case of land taxes assessed to non-residents, the Supreme Court of Massachusetts has decided, that they are only a lien upon the land, and not a personal charge. (*v*) The United States government has also a lien upon goods imported, for the payment of the duties; and by the recent excise law, it is provided, that the duties assessed upon the products of manufacturing and other labor, and upon income, shall be a lien upon all the property, whether real or personal, of the party taxed. (*w*)

By the English statutes, specialty crown debts, when duly recorded in the Court of Common Pleas, are a lien upon the debtor's real estate, and remain so, until a quietus in behalf of the debtor or accountant to the crown be registered. Simple contract debts to the crown, are a lien upon chattels personal; but if they have the force and effect of debts of record, as by ministerial or judicial record, they attach to the land possessed by the debtor, as well as his chattels personal. (*x*)

Statutes conferring liens for the benefit of mechanics and other artisans, usually prescribe certain forms of proceeding for the acquirement and enforcement of such liens; such as notice to the owner of the property in certain cases, recording a statement of the lien claimed, making a written demand for payment before proceeding to enforce the lien, commencing proceedings within a limited time, giving notice of the sale, and the like. It is important to observe, that all such requirements of the statute should be strictly complied with, in order that the benefit of the lien thus conferred, may be secured.

(*u*) Conard *v.* Atl. Ins. Co. 1 Pet. 386.

(*v*) Rising *v.* Granger, 1 Mass. 48. See also, Edwards *v.* Beaird, Breese (Ill.), 41.

(*w*) Laws U. S. 1862, ch. 119, §§ 69, 92.

(*x*) Cross on Liens, 119, 129.

SECTION VI.

OF EQUITABLE LIENS.

There are certain liens which exist only in equity; such as vendor's and vendee's lien in sales of real estate, lien by deposite of deeds, partnership liens, and liens *pendente lite.*

A vendor's lien on land holds for any part of the purchase-money which remains unpaid, against all persons except a purchaser for a valuable consideration without notice. This lien attaches without any agreement, and whether the conveyance has taken place or not. (*y*) But a mere volunteer who pays nothing for his deed, cannot set up want of notice against the claim of his grantor's vendor; (*z*) and if a manifest intention appears that such a lien shall not exist, equity will not enforce the claim. (*a*) An agreement of the vendee to assign his interest, seems not to divest the original vendor of his lien; nor will a receipt for the purchase-money, if it can be contradicted, defeat the lien. (*b*) Taking a security for the amount of the purchase-money may or may not defeat it, as the circumstances indicate, that the vendor did or did not intend to give credit solely to the person from whom the security is taken. The presumption is that the lien exists; and it is for the vendee to show that the taking a security was a waiver. (*c*)

(*y*) Mackreth *v.* Symmons, 15 Ves. Jr. 329; Selby *v.* Selby, 4 Russ. 336; Pollfexen *v.* Moore, 3 Atk. 273; Charles *v.* Andrews, 9 Mod. 152; Smith *v.* Hibbard, 2 Dickens, 730; McLearn *v.* McLellan, 10 Pet. 625; Gilman *v.* Brown, 1 Mason, 191, where there is a full discussion of the subject by Mr. Justice Story.

(*z*) Burlinghame *v.* Robbins, 21 Barb. 327.

(*a*) Mackreth *v.* Symmons, 15 Ves. Jr., 329; Brown *v.* Gilman, 4 Wheat. 255; Richardson *v.* Ridgley, 8 Gill & J. 87.

(*b*) Mackreth *v.* Symmons, Ves. Jr., 329; Hughes *v.* Kerney, 1 Sch. & Lef. 132; 2 Story, Eq. Jur. § 1225.

(*c*) Hughes *v.* Kerney, 1 Sch. & Lef. 132; The defendant was heir at law to his father who purchased an estate in Ireland, in the year 1741, the receipt for the full sum of the consideration-money being indorsed on the conveyances, but for a portion of the amount the purchaser gave his promissory note to a trustee of the vendor, to remain in his hands until the amount of the encumbrances on the estate were ascertained and paid off by the purchaser. The purchaser subsequently paid off several encumbrances, and also a sum of money to the trustee in reduction of the note. Some eight years after the purchase of the estate, the purchaser filed a bill against the

The lien prevails against a purchaser from the vendee, with notice that the latter gave a promissory note, which is unpaid, for a part of the purchase-money. (*d*) Taking a mortgage on a part of the estate sold, and the vendee's bond for the residue of the purchase-money, will destroy the vendor's lien; and it has been held, that taking a mortgage upon another estate, will produce the same effect. (*e*) If part of the consideration be, that the vendee shall pay off existing mortgages, and bonds be taken for the balance, the vendor's lien will hold. (*f*)

The vendee's lien arises in cases where he pays the purchase money prematurely, and the vendor, from inability or other cause, does not complete the title. In such cases equity gives the purchaser a lien upon the estate, even though he may have taken a specific security for the money so paid. (*g*)

The application to a court of equity for the enforcement of the vendor's or vendee's lien on land, is like one for the specific

vendor and trustee, praying an account of judgments and encumbrances affecting the lands, and that they should account with him; and that the note should be brought in and given up to him, he paying what was due thereon, if any thing. The suit was protracted for various causes for some eighteen years, when there was a decree to account, but nothing further was done in the cause. The vendor died some two years afterwards, and the present bill was filed by his younger children, principally for the purpose of making the lands liable for a part of the marriage portion of their mother. Though nothing was effected to this end, the transaction of the promissory note appeared upon the pleadings, though the bill did not pray any specific relief on that ground. The purchaser answered this bill, and died soon after, and some seventeen years later, this suit was a second time revived, in 1789, against the present defendant, as heir at law of the purchaser. An account was ordered of the principal and interest due on the foot of the purchase-money, and an account of the personal estate of the purchaser; and it appearing by the account that the purchaser left no personal estate, upon the hearing upon the report and merits, in 1801, it was decreed, that the sum of principal and interest found due, be a charge upon, and be raised out of the lands. Upon a rehearing before the Lord Chancellor, in 1803, it was contended for the defendant, that the taking a note, payable to the trustee, led by implication to the conclusion that the vendor's lien was not intended to be reserved; but the court held, that *prima facie*, the purchase-money is a lien on the lands, and that it lies on the purchaser to show that the vendor agreed to rest on the collateral security. The decree was affirmed, with costs. 2 Story Eq. Jus. § 1224; Tiernan *v.* Beam, 2 Ham. 383; but see Mayham *v.* Coombs, 14 Ohio, 428; Williams *v.* Roberts, 5 Ham. 35.

(*d*) Gibbon *v.* Baddall, cited by the Chanc. 15 Ves. Jr. 344; 2 Story's Eq. Jur. § 1226; White *v.* Williams, 1 Paige, Ch. 502.

(*e*) Capper *v.* Spottiswoode, 1 Tam. 21; Blackburn *v.* Gregson, 1 Cox, 90; Bond *v.* Kent, 2 Vern. 281; Richardson *v.* Ridgely, 8 Gill & J. 87; Young *v.* Wood, 11 B. Mon. 123.

(*f*) Blackburn *v.* Gregson, 1 Bro. C C. 420; where this opinion is indicated by the court; and see remarks of Lord *Eldon* in 15 Ves. Jr. 346; also, Hughes *v* Kerney, 1 Sch. & Lef. 132, *supra*.

(*g*) Burgess *v.* Wheate, 1 Wm. Blk 123; Lacon *v.* Mertins, 3 Atk. 1; Ætna Ins. Co. *v.* Tyler, 16 Wend. 385; Lowell *v.* Middlesex Ins. Co. 8 Cush. 127; Shirley *v.* Shirley, 7 Blackf. 452.

performance of a contract, which the court never grants if it would be violative of the principles of morality and justice, although, according to the technical rules of law, the contract would be valid. (*h*) This lien is not a mortgage, but has merely the incidents of one; it consists solely in debt, and must be

(*h*) Elysville Many. Co. *v.* Okisko Co., 5 Maryland, 152. This case came before the Court of Appeals, on appeal from the Court of Chancery. The Elysville Company had sold to the Okisko Company a tract of land for the sum of $25,000, in compliance with an agreement by which the grantor, a chartered corporation, was to be paid by the grantee, another corporation, in stock of the latter to that amount. A deed of the land was duly executed and delivered by the grantor, in which the consideration expressed was, "twenty-five thousand dollars," paid by the grantee to the grantor, and the president of the grantor corporation subscribed for two hundred and fifty shares at $100 per share, in the stock of the grantee corporation, and received the certificates of the same for his corporation, in pursuance of the agreement. The Elysville Company, after receiving 250 shares by its president, appeared at the stockholders' meetings of the Okisko Company, and acted with the other stockholders, voting on its shares. Subsequently, it filed a bill in chancery, for the purpose of enforcing a vendor's lien upon the land sold, alleging in the complaint, that, by the terms of the deed, the defendant bought the land for $25,000, in current money, and that the defendant had wholly failed to pay the complainant the consideration mentioned in the deed. The answer averred payment in compliance with the understanding of the parties, by the 250 shares of stock. The appellant contended, that, by its charter, it had no power to subscribe for the stock of the appellee; and that the subscription was not binding, because *at the time* of the subscription, ten dollars per share was not paid in cash, as the charter of the Okisko Company required. But the Court of Appeals held, that, as the whole amount of the subscription was paid by the conveyance of the property of the appellant, it was an executed contract, vesting in the appellant a clear title to the stock, with authority to assign, transfer, or otherwise dispose of it; and therefore no question could arise as to *the time* of the payment. In regard to the appellant's denial of its own authority to subscribe for the stock, the court said: "It is proper to be borne constantly in recollection, that this proceeding is an application to a court of equity, for the exercise of its extraordinary powers by way of injunction, and for the enforcement of a vendor's equitable lien, in the latter particular not unlike the application for the specific performance of a contract, which courts of equity never grant whenever it would be grossly violative of the principles of sound morality and justice, although, according to the technical rules of law, the contract would be valid. Again, there is another principle which is uniformly observed, and that is, whoever invokes the aid of a court of equity in his behalf, must do equity. In view of these principles, how is the appellant predicamented in a court of conscience? Thus: by its regularly appointed agents it executes and delivers to the appellee a conveyance of the property, and immediately thereafter receives, in payment therefor, a certificate of the capital stock of the appellee." The court then comment on the evidence, as showing clearly that the agents of the appellant must have had authority to receive and hold the certificate of stock, and as being wholly inconsistent and irreconcilable with the averments in the bill, and as positively affirming the truth of the answer of the appellee; and continue as follows: "This being so, how can the appellants, with any show of justice, ask the aid of a court of equity to assist them in avoiding the effect of a contract consummated, and which, so long as there was any prospect of advantage being derived from it to themselves, they not only recognized, but insisted on, and exercised their rights under? The inquiry suggests the proper response. Under the circumstances we have mentioned, good faith and common honesty forbid the relief asked." The decree of the Court of Chancery, dissolving the injunction and dismissing the bill, was affirmed with costs.

subject to all the incidents of debt, and cannot be enforced if the debt cannot be. If the debt be barred by the statute, the remedy to enforce the lien is also barred. (*i*) It is held to be paramount to the claim of the purchaser's widow, for dower. (*j*) In a large majority of the States of the Union, this lien is recognized and enforced, as well as in the courts of the United States; in Vermont, it is expressly abolished by statute; in Virginia, by statute, it must be expressly reserved in order to attach; in Maine, it is denied, (*k*) and in Connecticut, Delaware, and Massachusetts, the question of its existence seems to be in doubt, (*l*) although in the latter State it was formerly distinctly denied. (*m*)

The lien by deposit of title-deeds is upheld in equity, upon the ground of an agreement of the borrower to make a mortgage to the lender for the security of the debt. This lien is enforced by equity against the mortgagor, and all persons claiming under him with notice. (*n*) To render it effective, the deeds must be deposited as a *bona fide* immediate security; but they may be so deposited with a third person, as well as with the creditor himself, if solely for the security of the creditor. (*o*) Parol evidence is admissible to prove the purpose of the deposit. (*p*) This doctrine of creating a lien by a simple deposit of the title-deeds of an estate, has been strongly condemned by many able jurists, as being directly contrary to the statute of frauds. (*q*) In this country, where the system of registration is universal, it meets with less favor even than in England. It is, however, sustained in New York, (*r*) Rhode Island, (*s*)

(*i*) Trotter *v.* Evans, 27 Miss. 772.

(*j*) Fisher *v.* Johnson, 5 Ind. 492; Nazareth *v.* Lowe, 1 B. Mon. 257; Warner *v.* Van Alstine, 3 Paige, Ch. 513.

(*k*) Philbrook *v.* Delano, 29 Me. 410.

(*l*) Atwood *v.* Vincent, 17 Conn. 575; Budd *v.* Busti, 1 Harring. 69; Wright *v.* Dame, 5 Met. 503.

(*m*) Gilman *v.* Brown, 1 Mason, 191.

(*n*) 2 Story, Eq. Jur. § 1020; *Ex parte* Langston, 17 Ves. Jr. 227; Pain *v.* Smith, 2 Myl. & K. 417; Mandeville *v.* Welch, 5 Wheat. 277; Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

(*o*) Norris *v.* Wilkinson, 12 Ves. Jr. 192; Chapman *v.* Chapman, 3 Eng. L. & Eq. 70; 13 Beav. 308; *Ex parte* Coming, 9 Ves. Jr. 115.

(*p*) Russel *v.* Russel, 1 Bro. C. C. 269.

(*q*) *Ex parte* Whitebread, 19 Ves. Jr. 209.

(*r*) Mandeville *v.* Welsh, 5 Wheat. 277; Rockwell *v.* Hobby, 2 Sandf. Ch. 9. In this case the court held, that an advance of money to pay off a mortgage, at the request of the mortgagor, upon an agreement that the mortgage should be assigned to the one paying the money,

(*s*) Hackett *v.* Reynolds, 4 R. I. 512.

Georgia, (t) and South Carolina, (u) and seems to be recognized in Maine. (v)

Partners and other joint traders have, as between themselves, an implied equitable lien upon the joint property, for the payment of the joint obligations. (w) Under this principle it is held, that the assignees of a partner, individually bankrupt, can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership. (x) And the rule is the same as to all persons claiming under an individual partner. (y) But the joint creditors of a firm have no lien upon the partnership property, so as to prevent a *bona fide* disposition thereof by the firm, upon a dissolution or winding up of the concern. (z)

Where two persons join in the purchase of an estate which is conveyed to both, but one of them pays all the money, the

even though there was in fact no assignment of the mortgage, gave the payer an equitable lien on the estate so relieved; also, that evidence of such a payment of money by a testator, with the further evidence of the finding of the mortgagor's title-deed among the testator's papers, this fact not being otherwise accounted for, would establish an equitable mortgage in favor of the executors of the testator.

(t) Mounce *v.* Byars, 16 Ga. 469.

(u) Welsh *v.* Usher, 2 Hill, Ch. 170.

(v) Hall *v.* McDuff, 24 Me. 311.

(w) Per Ld. *Tenterden*, C. J., in Holderness *v.* Shackles, 8 B. & C. 618; 3 M. & R. 25; Foster *v.* Hall, 4 Humph. 346.

(x) Holderness *v.* Shackles, 8 B. & C. 618, 3 M. & R. 25. A, B, and C, together with others, were part owners of a ship engaged in the whale-fishery. The usual mode of managing the cargo was, that, on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B, and sold by him, and the proceeds applied toward the discharge of the ship's expenses. The blubber was deposited in a warehouse, rented by C, by the owners of the ship; and the oil produced from it was then put into casks, each owner's share being weighed out, and placed separately in the warehouse in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements was not paid. In that case the warehouseman used to detain the oil till the demand had been satisfied. The ship having arrived from her voyage, in 1825, the above course was pursued. The share of A was twenty-nine tons, which was set apart in the warehouse, with his initials on the casks. In January, 1826, A became bankrupt. Twenty tons of A's share had been delivered to him before his bankruptcy; the remaining nine tons continued in the warehouse at the time of his bankruptcy. In the same month the ship's husband, C, gave orders to the warehouseman not to deliver to A the remaining oil, as his share of the disbursements had not been paid. The assignees of A brought an action of trover against C for the residue of A's oil; and the court held, that the other part-owners, under these circumstances, had originally a lien on it for A's portion of the disbursements of the ship, and that this right was not divested by the separation of his share from the residue, and placing it in casks marked with his name, or by the charge of rent to him for warehouse-room.

(y) Holderness *v.* Shackles, 8 B. & C. 618; 3 M. & R. 25; Heydon *v.* Heydon, 1 Salk. 392; Chapman *v.* Koops, 3 B. & P. 289; Smith, Mer. Law, 28; Taylor *v.* Fields, 4 Ves. Jr. 398, per Ld. *Mansfield.*

(z) *Ex parte* Raffin, 6 Ves. Jr. 11).

'atter has no lien for the surplus so paid by him. (*a*) But expenses paid by one joint owner, in the repairs and alterations of an estate, attach as a lien upon the property. (*b*) A covenant to convey and settle particular lands — as, for example, in contemplation of marriage — is treated in equity as a lien upon those lands, holding them, whatever hands they may happen to fall into, either by operation of law, or by act of party. We apprehend, however, that courts of law, wherever any distinction remains between equity and law, would regard such a covenant as creating a mere personal obligation. (*c*)

Lis pendens, which has something of the effect of an equitable lien, operates in favor of a party to a suit, by preventing his antagonist from conveying his estate by a valid title during the pendency of the suit. This protection of the litigant from

(*a*) 2 Sugd. on Vend. 7 Am. ed. 387; and see Collinson *v.* Owens, 6 Gill & J., Stansell *v.* Roberts, 13 Ohio, 148, and McKay *v.* Green, 6 Johns. Ch. 56, as to advancing money to enable a purchaser to complete the purchase; Glascock *v.* Glascock, 17 Tex. 480. The plaintiff's intestate and the defendant having taken a bond for a deed of real estate, and the defendant having subsequently procured the deed to be made to him alone, the plaintiff and an assignee of the intestate sued to recover the portion of the estate which, by mutual agreement between the covenantees of the bond, was to be the share of the intestate. The defendant claimed to have paid all the purchase-money, and that he had a lien, on the portion of the estate demanded, for the amount advanced by him for the intestate, as also for monies expended by him in the improvement of the estate. The Supreme Court, upon appeal from the court below, held, that the defendant had no lien for the purchase-money advanced by him for the intestate; that he had a lien for advances made by him for improvements made by the authority of the intestate, but none for expenditures subsequently made for improvements, when he was forbidden to make the improvements by the rightful claimants of the property. The decree of the court below, to put the plaintiffs in possession of the portion of the estate claimed, and making the defendant's demand for the purchase-money advanced, a simple administration debt against the intestate's estate, was accordingly affirmed.

(*b*) Dart on Vend. 434, Am. ed.; Lake *v.* Gibson, 1 Eq. C. Abr. 291. In a decree at the Rolls, *Trin.* 1729, the Master of the Rolls held, that, "if two or more make a joint purchase of lands, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and that, in all other cases of joint undertaking or partnership, either in trade or in any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who died." This doctrine as to advances creating a lien on the land, was acted upon in Glascock *v.* Glascock, 17 Tex. 480; also in Kennedy *v.* Kennedy, 3 Ala. 434, where it was held, that a defendant, decreed to reconvey one undivided moiety of land to the complainant, had a lien upon the land, by virtue of the legal estate with which he was invested, for his advances for improvements, and that the court should not enforce the execution of the conveyance decreed without protecting this lien. See also, Hamilton *v.* Denny, 1 Ball & B. 199, which maintains the same principle in the case of joint lessees, where the whole expenditure for renewals is paid by one, and the others reap the benefit of the payment.

(*c*) Freemoult *v.* Dedire, 1 P. Wms. 429.

the act of alienation of his adversary, is sometimes based upon the fiction of law that every person has notice of what is passing in the courts of the country. (*d*) It may, however, with more propriety be said that it rests upon public policy; for, in some cases where it operates, there is no possibility that the party should have notice of the pendency of the suit. (*e*) The lien is not available in England at the present day, except against persons having actual notice, unless a record of the particulars of the suit be made in a registry established for that purpose by statute. (*f*) The doctrine of notice *pendente lite* is also applied to the special subject of the suit, whether real or personal property.

This doctrine does not apply in a case where the court has no jurisdiction over the thing in controversy; as where the court has jurisdiction over the person of the defendant, but not over the land which is the subject-matter of the contract. (*g*) It has been decided, that the statute notice required in New York, is

(*d*) Worsley *v.* Scarborough, 3 Atk. 392; Preston *v.* Tubbin, 1 Vern. 286.

(*e*) Newman *v.* Chapman, 2 Rand. 93, per *Green*, "The rule as to the effect of a *lis pendens* is founded on the necessity of such a rule to give effect to the proceedings of courts of justice. Without it the administration of justice might, in all cases, be frustrated by successive alienations of the property which was the object of litigation pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. This necessity is so obvious, that there was no occasion to resort to the presumption that the purchaser really had, or by inquiry might have had, notice of the pendency of the suit, to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For, at common law, the writ was pending from the first moment of the day on which it was issued and bore *teste;* and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit, as the defendant would have held it if no alienation had been made. The Court of Chancery adopted the rule, in analogy to the common law, but relaxed, in some degree, the severity of the common law." "Again, a bill of discovery, or to perpetuate the testimony of witnesses, ought, if all persons are bound to take notice of what is going on in a court of justice, to be notice to all the world, as much as a bill for relief. But these are decided to be no notice to any purpose; a proof that the rule as to the effect of a *lis pendens* is one of mere policy, confined in its operation strictly to the purposes for which it was adopted, — that is, to give effect to the judgment and decrees of courts of justice, — and that it is not *properly* a notice to any purpose whatsoever. The English judges and elementary writers have carelessly called it a notice, because, in one single instance, it had the same effect upon the interests of a purchaser as a notice had, though for a different reason. But the courts have not, in any case, given it the real force and effect of a notice." Woodfolk *v.* Blount, 3 Hey. 147.

(*f*) 2 Vict. ch. 11, § 7.

(*g*) Carrington *v.* Brents, 1 McLean, 167.

only a means of publicity, and does not affect the sufficiency of the notice arising from the contents of the bill, to charge a purchaser. (*h*)

There is also an equitable lien in favor of the assignee of a debt, on the money in the hands of the debtor. In a case like this, the assent of the debtor to the assignment is necessary, to enable the assignee to sue at law; but not so in equity. (*i*) A consignor has also an equitable lien on money unapplied by an agent, or goods consigned to him for some special unexecuted object. Here the lien depends upon privity of property, and to establish it, the property must be clearly identified, or its proceeds exist or be accessible in separate money, securities, or a new investment. (*j*)

(*h*) Griffith *v.* Griffith, Hoff. Ch. 153.

(*i*) Row *v.* Dawson, 1 Ves. 331; Adams *v.* Claxton, 6 Ves. Jr. 226.

(*j*) Taylor *v.* Plumer, 3 M. & S. 562. This was an action of trover brought by the assignees of a stock-broker against the defendant, who had intrusted the broker with money to be invested in exchequer bills. The broker, with a design to embezzle a large portion of the money so intrusted to him, invested that portion in foreign securities, and left his home with the purpose of fleeing the country. He was pursued and overtaken, and surrendered the certificates of the securities so obtained, to an agent of the defendant. The latter caused them to be sold, and retained the proceeds in lieu of the money of which he had been defrauded. A commission of bankruptcy was taken out against the defaulting broker, and this action was brought by the assignees to recover the value of the securities thus surrendered to the defendant, as assets of the bankrupt estate. The case came before the Court of King's Bench upon the question whether the plaintiffs were entitled wholly or in part to recover, and if neither, then a nonsuit to be entered. The counsel for the defendant admitted, that specific property in the possession of an agent, who becomes bankrupt, which was intrusted to him for a special purpose, belongs to the principal, and not to the representatives of the bankrupt agent; also, that where the property is not the same, but has been acquired by the bankrupt in lieu of the trust property, and in pursuance of the trust, the same rule applies to it, provided such property is capable of being ascertained. But he took this distinction, that where the property had been tortiously acquired by the agent, in fraud of the trust, there the lien of the principal was at an end; because he could not, for his own private advantage, and to the prejudice of all the other creditors, aver what has been done in fraud of his trust, to have been done in execution of it. On the other side, this distinction was denied, and the rule asserted to be general, that nothing passed by the assignment but what was in equity, as well as law, the property of the bankrupt. The court held, that no change in the form of the property, so long as it could be identified, and no act of the agent, could divest the owner of his right thereto, whether it was in the hands of the agent, or of those who represent him in right. Lord *Ellenborough*, in giving the judgment of the court in favor of the defendant, said: "And indeed, upon a view of the authorities, and consideration of the auguments, it shows that if the property, in its original state and form, was covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favor of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of

Another equitable lien, which depends upon privity of parties, is recognized in favor of one for whom directions have been given to an agent or consignee, to retain money or goods. In this case, equity as well as law requires the assent of the holder and the beneficiary, in order to enable the latter to assert a lien or to sue. For the holder of the property is not the debtor but the bailee of the owner. (*k*) An acceptor or indorser of a bill of exchange for accommodation of the drawer, has an equitable lien on any property of the latter that may be in his hands. (*l*) Trustees have a lien upon the trust estate for their expenses, but not their agents. (*m*)

In concluding this chapter on lien, we may remark generally, that there is no difference in the rules of decision as to liens, in equity or in law, and that a court of equity will relieve, in a case where there is a lien at law, if, from the difficulties attendant upon it, the parties are unable to obtain justice at law. (*n*) We would add, that the liens of vendors, carriers, innkeepers, pledgees, factors, and some others, have been somewhat considered in previous chapters, especially in those on Bailment, Factors and Brokers, Sales, and Shipping.

it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law." "It makes no difference, in reason or law, into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal (as in Scott *v.* Sherman, Willes, 400), or into other merchandise (as in Whitcomb *v.* Jacob, Salk. 160); for the product of, or substitute for the original thing, still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description." A nonsuit was ordered to be entered.

(*k*) Scott *v.* Porcher, 3 Mer. 652.

(*l*) Madden *v.* Kempton, 1 Camp. 12; Wilkins *v.* Kasey, 7 T. R. 711.

(*m*) Worrall *v.* Harford, 8 Ves. Jr. 4; Murray *v.* De Rottenham, 6 Johns. Ch. 52.

(*n*) Weymouth *v.* Boyer, 1 Ves. Jr 416, 2 Story Eq. Jur. § 1216, *a*.

CHAPTER X.

STAMPS REQUIRED BY THE EXCISE LAW.

Sect. 1.— *Of the General Principles of the Stamp Law.*

THE Statute of the United States, passed July 1st, 1862, Chapter CXIX, entitled, "An Act to provide Internal Revenue to support the Government and to pay Interest on the Public Debt," establishes a comprehensive system of Stamp Duties, embracing within its provisions almost all the documents which are used in the transactions of business, as well as a great variety of articles which are the subject of trade.

It is apparent, on the face of the statute, that it was modeled upon the English stamp-acts; but its provisions being somewhat different from those acts, in substance as well as language, the precedents established by English litigation, as to construction and application, can be but of limited service in adjudicating the questions which may arise under our statute. So far as the terms of the United States law conform to the English, the decisions under the latter may be referred to with advantage in this work; and more especially in the infancy of our own law, when but few of its provisions have been passed upon by the courts of this country.

The operation of the English and the American statutes upon unstamped instruments, is substantially the same. The English provision is, that the unstamped instrument "shall not be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity." The American statute provides, that such an instrument "shall be deemed invalid and of no effect." In both cases the exclusion deprives the document of all power to give a right or create an obligation, or sustain a defence, and precludes its use as evi-

dence in support of any action or of any defence. The instrument is in fact a nullity until the appropriate stamp be affixed, whether issued or not; but in cases where the law permits the stamp to be affixed subsequently to the issue, the effect of the stamping is retroactive, conferring upon the document validity from its date. The doctrine of the retroactive effect of a stamp, has been carried even further than this in the English cases; it having been decided, that an unstamped instrument, if it be one that can be made available by being stamped, on any terms, may be the subject of trover. (*a*) In all cases where the law does not permit the post-stamping of a document, we think it must be entirely certain that trover could not be maintained.

The recognized rule of construing penal statutes strictly, and giving a liberal interpretation to words of exception contained therein, would doubtless be applied, by the courts of this country, to a statute so directly penal, and so clearly in restraint of common right as the United States Stamp Laws. (*b*) It is a well-settled principle, that every charge upon the subject must be imposed by clear, unambiguous words. (*c*) But it is equally certain, that no interpretation will be adopted which must defeat the purpose of the law, provided the language of the statute admits, fairly and rationally, of an interpretation which sustains that purpose. (*d*)

No acts of parties in evasion of the statute would be tolerated by courts, such as an agreement that the objection for want of a stamp should be waived, (*e*) or the alteration of a document by consent, to avoid the necessity of restamping. (*f*) But any compliance with the requirements of the statute, that are consistent with the law itself, though less burdensome to the party than some other mode pointed out by the law, would probably be held sufficient. Thus, a severance of amounts, or

(*a*) Scott *v.* Jones, 4 Taunt. 865; McLeod *v.* McGhie, 2 Scott, N. R. 604.

(*b*) 1 Blk. Com. 88, and notes by Sharswood; Warrington *v.* Furbor, 8 East, 242; Denn *v.* Manefold, 4 B. & C. 243; Brandling *v.* Barrington, 6 B. & C. 467; Tomkins *v.* Ashby, 6 B. & C. 541; U. S. *v.* Gooding, 12 Wheat. 460; Whitcomb *v.* Rood, 20 Vt. 49.

(*c*) Wroughton *v.* Turtle, 11 Mees. & W. 561; Gurr *v.* Scudds, 11 Exch. 190; Smith *v.* Spooner, 3 Pick. 229; Sewall *v.* Jones, 9 Pick. 412; Sprague *v.* Birdsall, 2 Cow. 419.

(*d*) U. S. *v.* Wilterberger, 5 Wheat. 76; The Emily & Caroline, 9 Wheat. 388; Platte *v.* Routh, 6 Mees. & W. 756.

(*e*) Owen *v.* Thomas, 3 Myl. & K. 353.

(*f*) ——— *v.* Lee, cited 2 Eq. Cas. Abg. 414; Bennison *v.* Jewison, 12 Jur. 485.

a deduction from the consideration, for the purpose of diminishing the stamp duty, has been regarded as no evasion of the law. (*g*)

SECTION II.

OF THE GENERAL PROVISIONS OF THE STATUTE.

The general provision of the United States Statute, imposing stamp duties upon instruments, is as follows: "Sec. 94. *And be it further enacted*, that on and after the first day of October, eighteen hundred and sixty-two, there shall be levied, collected, and paid, for and in respect of the several instruments, matters and things mentioned and described in the schedule (marked B) hereunto annexed, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several duties or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in said schedule."

It will be seen by the above, that the obligation to stamp, is imposed upon the party making or causing the instrument to be made; and it would seem that no stamping by any other party than the one designated, would be a sufficient compliance with the requirement of the law. Where there are several parties who execute an instrument, it is doubtless sufficient for any one of them to affix the necessary stamp; and this view is held by the U. S. Commissioner of Internal Revenue. (*h*)

The penal and invalidating clause of the act, in reference to unstamped instruments, is as follows:

(*g*) Abraham *v.* Dubois, 4 Camp. 269; Shephard *v.* Hall, 3 Camp. 180. In this case it was held, that an indenture of apprenticeship was not void, by reason of the premium being stated at £19 19*s.* 6*d.* which was the sum paid, when £20 was agreed upon originally; the reduction having been made to avoid a part of the stamp duty. Hawkins *v.* Clutterbuck, 2 Car. & K. 810, is to same effect.

(*h*) Boutwell's U. S. Tax System, 389.

"Sect. 95. *And be it further enacted*, That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the duty hereby imposed thereon, or without having thereupon an adhesive stamp to denote said duty, such person or persons shall incur a penalty of fifty dollars, and such instrument, document, or paper, as aforesaid, shall be deemed invalid and of no effect."

The terms "make sign or issue," in the above section, and elsewhere, where used in the statute, are doubtless to be understood in a collective and not in an alternative sense, with reference to the obligation of affixing the proper stamp. Otherwise, no instrument could be valid if the party signed it without first affixing the stamp, which cannot be the meaning of the law. The word "make" is to be understood in its legal sense, as applied to instruments, as including both the signing where signing is necessary, and the delivery or issue, for use. An instrument is not "made" so as to be of any binding effect, until it is delivered; it then becomes complete for all the purposes for which it was intended and is adequate; and the law fixes upon the period of this completion, as the proper time for affixing the stamp. This view of the meaning of these terms is put forth by the Commissioner of Internal Revenue, in his instructions as to the application of the law. (*i*)

The question as to who is to bear the expense of the stamps required upon any instrument, whether the party making or the one receiving it, is not settled in terms by the statute. In the absence of any agreement between the parties as to this matter, we presume that the courts would decide that the expense should be borne by the maker; since the duty of affixing, and the penalty for neglecting so to do, are imposed upon him, and not upon the receiver.

By an amendment to the statute, contained in the act of March 3d, 1863, it is provided, that no instrument made prior to the first day of June, 1863, without being duly stamped,

(*i*) Boutwell's U. S. Tax System, 387.

shall, for that cause, be deemed invalid or of no effect; but the same may be admitted and used as evidence in any court, upon the proper stamp being affixed thereto by the person desiring to use the instrument. But this amendment, suspending the invalidity of any unstamped instrument issued between the first day of October, 1862, and the first day of June, 1863, does not suspend the penalty for issuing the instrument without a stamp, and the maker would still be liable to a prosecution therefor, though the invalidity were healed by post-stamping.

The duty of effectually cancelling an adhesive stamp, so that it may not be again used, is imposed upon the person using or affixing the same; (*j*) and a forfeit of fifty dollars is imposed upon any person fraudulently making use of an adhesive stamp without cancelling it. (*k*) We apprehend that this penalty applies more especially to the maker of the instrument; it is, however, possible that its application may be extended so as to include any person who receives and uses an instrument with an uncancelled adhesive stamp. The object of the provision is to prevent fraud upon the revenue, by the re-use of a stamp which has once done its office; and the receiver of an instrument bearing an uncancelled stamp may as effectually promote such fraud, by using without cancelling it, as the one who first sends it forth. As the language of the statute may be sufficiently broad to cover any person who makes use of an uncancelled stamp, by relying upon it to denote a revenue duty, and as such a use would come within the mischief of the law, it is not certain that the application of the penalty may not be thus broad. If this view be correct, no person can safely receive and use an instrument bearing an uncancelled stamp.

The validity of an instrument is not affected by not cancelling the stamp, under our statute. By the English statutes the effect is otherwise; an instrument with an uncancelled adhesive stamp upon it, being as unavailable for any purpose, as one that is unstamped. (*l*) This difference in the consequences of non-cancelling, makes the question as to whose duty it is to cancel the stamp, one of comparatively little importance.

(*j*) § 99, Act July 1, 1862.

(*k*) § 99, Act July 1, 1862.

(*l*) 17 & 18 Vic. c. 83, § 3; 23 & 24 Vic., c. 111, § 12; Pooley *v.* Brown, 1 Com. B. 566.

The initials of the maker and the date of cancelling, borne upon the stamp, would be of some service in showing that the stamp was affixed at the proper time; but if the proper stamp be upon the instrument, whether cancelled or not, we see not how any court in this country can refuse to receive the instrument as valid and effective, since the law does not expressly repudiate it. The question whether the stamping was done at the proper time, could probably be raised, whether the stamp was cancelled or not; but we apprehend that in either case the burden of proof would be upon the party alleging the objection.

By Sect. 107 of the statute, the manufacturers and dealers in proprietary medicines and preparations, perfumery, cosmetics, playing cards, and other articles enumerated in schedule C, are required to affix an adhesive stamp to the packages in which the articles are exposed for sale, under a penalty of ten dollars for neglect so to do. By a subsequent amendment, this provision was declared to be in force on and after the first day of September, 1862. By the amendatory act passed March 3, 1863, it is declared, that any person who shall offer for sale any of the articles named in schedule C, after the first day of September, 1863, whether the articles so offered are imported, or are of foreign or domestic manufacture, shall be deemed the manufacturer thereof, and subject to all the duties, liabilities, and penalties, in said act imposed, in regard to the sale of such articles, without the use of the proper stamp or stamps as in said act required.

All the provisions of the statute relating to dies, stamps, adhesive stamps, and stamp duties, except where manifestly inapplicable, extend to and include all the articles of schedule C subject to stamp duties, and to the requirements in relation thereto. Private stamps are allowed to such proprietors of these articles as may choose to adopt them, in lieu of the general revenue stamp provided for that purpose by the government. The general revenue stamp, if used, must be cancelled in the same way as the stamp provided for documents; namely, by marking the initials of the party using it, and the date of cancellation, across the face of the stamp. The proprietary or private stamps are to be in the shape of labels, and the mode provided by the

act for cancelling them, is, by so affixing the label to the package, that in opening the same or using the contents therof, the stamp shall be effectually destroyed. The forfeit for not cancelling a general revenue stamp, is fixed by the same provision in Sect. 99, that relates to the fraudulent use without cancelling of document stamps. The provision (in a subsequent part of the same section) as to the penalty for not properly affixing the proprietary stamp, so that it will be destroyed by opening or using the package upon which it is placed, is somewhat obscure. The words of the provision are as follows: "That in all cases where such stamp is used, instead of his or their writing his or their initials and the date thereon, the said stamp shall be so affixed to the box, bottle, or package, that in opening the same, or using the contents thereof, the said stamp shall be effectually destroyed; and in default thereof shall be liable to the same penalty imposed for neglect to affix said stamp as *herein before prescribed* by this act." Now there is no penalty "before prescribed" or "imposed" for neglect to affix a proprietary stamp, the penalty for such neglect being in a subsequent section of the act; namely, the 107th, which provides that no person shall make, prepare and sell, or remove for consumption or sale, the articles enumerated in schedule C, without affixing thereto an adhesive stamp or label, "and in default thereof shall incur a penalty of ten dollars." As the "*forfeit*" for not cancelling a revenue stamp is fifty dollars, it is a matter of some importance to determine whether the act is to be construed as applying that "forfeit" as the penalty for the non-cancelling of a proprietary stamp, or the smaller penalty of ten dollars. There may be some reason in fixing a less penalty in the case of non-cancelling a proprietary stamp, than in that of a general revenue stamp, founded on the more limited use to which the former could be put for fraudulent purposes; and this consideration, together with the use of the word "penalty" instead of "forfeit," might lead to the conclusion that the fair construction of the statute should be, to impose a penalty of ten dollars only for not properly affixing a proprietary stamp.

SECTION III.

WHAT DOCUMENTS MAY BE POST-STAMPED.

In view of the invalidity of all unstamped documents, it is of some consequence to determine what documents may be rendered valid by post-stamping. Under the English stamp acts almost all documents made at home, with the exception of bills, notes, receipts and policies, may, though unstamped when made, or stamped with an insufficient stamp, be properly stamped on payment of the regular duty and the penalty provided by law. (*k*) In this respect there is a wide difference between the English laws and our own, there being in the latter no permanent provision made for stamping any home-made instrument after it is issued.

As has already been stated, any instrument made prior to June 1st 1863, that is liable to a stamp, may be post-stamped, and thus rendered available in court for any purpose. By Sec. 101, bills of exchange, drafts or orders drawn or purporting to be drawn abroad, but payable in the United States, may be stamped before use in this country; and by Sec. 6, of the amendatory act of March 3d, 1863, any document of any kind, made or purporting to be made in any foreign country, to be used in the United States, is liable to the same duty as similar documents made or issued in this country, and may be stamped by the party using it, at any time before such use. This provision would doubtless authorize the stamping of bills drawn and payable abroad, but received in this country for negotiation. It might also, by a liberal construction of the terms "any foreign country," authorize the post-stamping of any documents made at sea. (*l*) These are the only provisions which authorize post-

(*k*) 3 Chitty's Stats. 2 Ed. 1207; Beckwith *v*. Benner, 6 C. & P. 681. Chervet *v*. Jones, 1 Mad. & Gel. 267; Owen *v*. Thomas, 3 Myl. & K. 353.

(*l*) Ximenes *v*. Jaques, 1 Esp. 311.

stamping, and no document that does not fall under one or the other of them, can be post-stamped.

SECTION IV.

OF THE DUTY ON CONTRACTS NOT SPECIFIED.

By the broad terms of Schedule B, all agreements or contracts other than those specified in the schedule, are liable to a stamp of five cents for every sheet or piece of paper on which the same shall be written. No agreement not before required to be in writing need be so in consequence of this statute, with the single exception of contracts concerning the loan or sale of specie; but any agreement that is in writing, whether by choice of the parties, or from the general requirements of law, must be stamped.

The English act makes an agreement liable to a stamp, only "where the matter thereof shall be of the value of £20, or upwards," but includes in the specification any minute or memorandum of an agreement, whether the same is only evidence of a contract, or obligatory upon the parties from its being a written instrument. By the same act, a memorandum, letter, or agreement for the sale of goods, wares, or merchandise, is exempt from duty. (*m*)

As to what constitutes an agreement within the meaning of the stamp laws, it may be sufficient to say, that it must be an undertaking, between two or more parties, for the doing, or the not doing, of some particular thing. (*n*) The rule as to agreements that are subject to the stamp law was stated as follows, by Baron *Parke*, in an English case: "Such memorandums only require to be stamped as would be evidence against both the contracting parties (per *Erskine*, J., in Vaughton *v.* Brine, 1 M. & G. 559), though I incline to think the more correct definition to be, that a written instrument, to come within the

(*m*) 55 Geo. 3, ch. 184; 13 & 14 Vict. ch. 97

(*n*) See Vol. i. p. 6.

terms of this clause of the stamp-act, must have been made with the intention of containing in itself the terms of an agreement between the parties." (*o*)

There is a difference between an agreement and a simple acknowledgment upon which the law will imply a promise to pay, the latter being held not to require an agreement stamp. Thus, in the case of an I. O. U., offered in evidence without a stamp, the court admitted it, on the ground that it was not an agreement. (*p*) But it was held, that such a document, with the addition of words representing that the amount was to be paid on a certain day, required either an agreement or a promissory-note stamp. (*q*) So a mere acknowledgment of having received funds for a particular purpose, does not require an agreement stamp. (*r*) An acknowledgment that another party has accepted a bill for the accommodation of the drawer, which the latter agrees to provide for at maturity, is held not to require an agreement stamp. (*s*) In this case the court held, that the paper amounted to an acknowledgment only, as the obligation expressed therein was nothing more than what the law would imply without any such stipulation.

It has also been decided, that a mere proposal not acted upon, does not require an agreement stamp, in order to its admission as evidence in an action upon a contract relating to the same subject. (*t*)

Where the contract arises from an offer in writing, and there is a parol acceptance, as by complying with the proposed terms, the entire contract is not in writing, and cannot be stamped. (*u*) So a document signed by a tenant, requesting the bailiff in possession to go out for a certain time and forbear to sell, and if the rent should not be paid, agreeing to let him resume possession, and deal with the goods as if then distrained, was held not to require a stamp, being a mere license. (*v*) Under the

(*o*) Knight *v.* Barber, 16 M. & W. 70.

(*p*) Per Lord *Abinger*, in Beeching *v.* Westbrook, 8 M. & W. 411.

(*q*) Brooks *v.* Elkins, 2 M. & W. 74.

(*r*) Watkins *v.* Hewlett, 3 Moore, 211, 1 Bro. & B. 1.

(*s*) Notley *v.* Webb, 5 C. B. 834.

(*t*) Doe *v.* Cartwright, 3 B. & Ald. 326; Penniford *v.* Hamilton, 2 Stark. 475; Edgar *v.* Blick, 1 Stark. 464; Drant *v.* Brown, 3 B. & C. 665, 5 D. & R. 582; Clay *v.* Crofts, 20 L. J. Exch. 361.

(*u*) Chaplin *v.* Clarke, 4 Exch. 403; Moore *v.* Garwood, 4 Exch. 681.

(*v*) Fishwick *v.* Milnes, 4 Exch. 826; Pyle *v.* Partridge, 16 M. & W. 20.

English statutes, any memorandum which contains the evidence of an agreement, although not signed, is held to require a stamp. (*w*) But in the absence of any provision in our statute, as to stamping a memorandum or minute of an agreement, we are inclined to think, that an unsigned memorandum or minute might be used as evidence in the courts of this country, though not stamped.

An agreement to receive a debt by instalments, and upon the last instalment being paid, to give a receipt in full of all demands, has been held to require a stamp. (*x*) An assignment of a patent right is not regarded as an agreement by the Commissioner of Internal Revenue, but as liable to a certificate stamp of five cents. (*y*)

A document in the handwriting of one party, and signed by the other, whereby the latter agreed to do certain work, has been held to be more than a mere proposal, and to require a stamp under the English law. (*z*) Probably the same rule would be held under the United States' statute.

Whether an acknowledgment in writing, made for the purpose of preventing the operation of the statute of limitations, would require a stamp, may be questionable. By the English law such an acknowledgment or promise is specially exempted from stamp duty. (*a*) But if terms are imported into the instrument which give it the force of a promissory note, it is held to be liable to duty as such. (*b*) As it would be almost impossible to frame such an acknowledgment, so that it would not be construed into an agreement, and there being no exemption of an instrument of this character in our statute, it would be advisable to stamp it as an agreement.

A new agreement indorsed on a stamped agreement, if it vary the terms of the latter, will require a new stamp; and as the original terms are superseded by the new, if the new agreement be unstamped, the plaintiff cannot recover upon either. (*c*)

(*w*) Duffill *v.* Spottiswoode, 3 C. & P. 435; Stephens *v.* Lowe, 9 Bing. 32.

(*x*) Remon *v* Hayward, 2 A. & E. 666.

(*y*) Boutwell's U. S. Tax System, 393.

(*z*) Hegarty *v.* Milne, 14 C. B. 627.

(*a*) 9 Geo. 4, c. 14, § 8.

(*b*) Jones *v.* Ryder, 4 M. & W. 32.

(*c*) Reed *v.* Deere, 7 B. & C. 261; Bacon *v.* Simpson, 3 M. & W. 78; Thomas *v.* Bird, 9 M. & W. 68; Carpenter *v.* Buller, 2 M. & Rob. 298.

If, however, the alteration of the terms is made while the agreement is *in fieri*, a second stamp will not be necessary. (*d*)

Any instrument may be altered or added to, by consent of parties, without the requirement of a new stamp, where it is merely to correct a mistake, (*e*) or where it has not discharged its functions, (*f*) or where no new subject is introduced, and also where the matter of it is still *in fieri*. (*g*) But such an alteration, even on account of mistake, cannot be made unless the parties have consented. (*h*) When a stamped document has once been issued, made, or executed, and delivered in a perfect form and as a valid security or instrument, any material alteration, by addition or otherwise, will render the stamp of no effect. It is obvious that two questions may arise, as to the validity of a stamped instrument that has been altered, — first, as to the effect of the alterations upon the instrument itself; and, secondly, as to their effect upon the stamp. If the alterations are of such a character as to destroy the instrument itself, the question as to the stamp does not arise; but if, under the general law, the altered document is still valid, the question whether the stamp applies to it, or not, is to be determined by the consideration, whether such altered document is the original instrument to which the stamp was affixed, or a new one by reason of the alterations, and therefore void for not being again stamped. (*i*)

A notice may contain the terms of an agreement, and, as such, be liable to a stamp. Thus, a notice signed by partners, stating that *they had agreed* to dissolve partnership, was sent to a newspaper for publication. Upon the original of this notice being offered as evidence of the agreement to dissolve, it was held to be inadmissible for want of a stamp. (*j*) But, in another case, an original notice, stating that a partnership *had been* dissolved, was determined not to be an agreement for a

(*d*) Spicer *v.* Burgess, 1 C., M. & R. 129; Peate *v.* Dicken, 1 C., M. & R. 422.

(*e*) Kershaw *v.* Cox, 3 Esp. 246.

(*f*) Callow *v.* Lawrence, 3 M. & S. 95.

(*g*) Webber *v.* Maddocks, 3 Camp. 1.

(*h*) Perring *v.* Hone, 2 Car. & P. 401; 12 Moore, 135.

(*i*) Rogers *v.* McCarthy, 3 Esp. 106; London & B. R. Co. *v.* Fairclough, 2 M & G. 674; Hill *v.* Patten, 8 East, 373 and see French *v.* Patton, 9 East, 351

(*j*) May *v.* Smith, 1 Esp. 283

dissolution, but a mere recital that it had already taken place, and therefore admissible in evidence to prove the former partnership without being stamped. (*k*)

A request does not amount to an agreement, so as to require a stamp. (*l*) And under the English statutes it is held, that neither an undertaking to do work at a price to be fixed by somebody else, (*m*) a letter promising marriage, (*n*) nor an undertaking to pay interest-money, requires an agreement-stamp. (*o*) A letter of appropriation of payment, though irre vocable, does not require an agreement-stamp. (*p*) An undertaking to indemnify bail is held to be an agreement, under the English statutes, and would doubtless be regarded so under ours. (*q*) A promise to pay money, the amount being entirely uncertain, is held to be properly stamped as an agreement. (*r*)

Where there are several distinct agreements or contracts in the same instrument, there must be distinct stamps for each one of them; and this, whether all be original and independent, or some be leading, and others collateral and accessory. Thus, it has been held, that a contract for the purchase of several lots of goods, at separate prices, requires several stamps. (*s*) And, on the same principle, where parties, by a stamped agreement, entered into a wager, and then, by an endorsement made thereon, agreed that the stake should be doubled, two stamps were held to be necessary. (*t*) If a paper be produced with a single stamp, and it appears to have contained originally two distinct agreements, one of which is erased, the stamp will be, *prima facie*, sufficient; and it is for the opposite party to show

(*k*) Jenkins *v.* Blizard, 1 Stark. 418; Wheldon *v.* Mathews, 2 Chit. 399.

(*l*) Vollans *v.* Fletcher, 11 Jur. 416; Willey *v.* Parratt, 3 Exch. 211.

(*m*) Rowland *v.* Lazarus, 1 Fos. & Fin. 466.

(*n*) Orford *v.* Cole, 2 Stark. 351.

(*o*) Temple *v.* Steinau, 8 Exch. 622.

(*p*) Walker *v.* Rostron, 9 M. & W. 411. In this case the defendant, a factor, had received and assented to a letter from his principal, appropriating the proceeds of certain goods, then in the hands of the factor and belonging to the principal, to the payment of several acceptances which the principal owed to the plaintiff. This arrangement was made at the instance of the plaintiff, who was a party thereto. The principal having become bankrupt before the acceptances fell due, the defendant refused to pay the proceeds of the goods to the plaintiff, and surrendered them to the assignees. The court held, that the letter of assignment was irrevocable without the consent of all parties, and that it did not require a stamp, either as an inland bill, or as an agreement.

(*q*) Wrigley *v.* Smith, 5 B. & Ad. 1117.

(*r*) Smith *v.* Nightingale, 2 Stark. 375.

(*s*) Watling *v.* Horwood, 12 Jur. 48.

(*t*) Robson *v.* Hall, Peake, 128.

that both the agreements were on the paper at the time the stamp was affixed. (*u*)

Where several parties sign an agreement for one common purpose, though the interest of each be separate, and their obligation be several, but one stamp is required. Thus, an agreement by several persons to subscribe to a common fund, in definite sums as to each, is held to be subject to a single stamp only. (*v*) So in the case of an agreement relative to prize-shares, though several as to each person, but one stamp is necessary; (*w*) or for the reference of an insurance cause to arbitration, the underwriters who sign having a community of interest in the matter. (*x*)

Where a paper contains contracts by several persons, relative to different things, and bears but one stamp, the paper may be read as to that part of it to which the stamp is exclusively applicable, if the circumstance of juxtaposition to the signature of the party relying upon that part will justify the supposition that the stamp is applicable to his signature. (*y*) In the absence of any controlling considerations, the stamp will be regarded as applicable to the party first executing the instrument. (*z*)

An agreement or contract is sometimes evidenced by a series of letters between the parties, and in this case the English statutes provide, that it shall be sufficient if one of such letters be stamped with the prescribed agreement-stamp. The United States Statute contains no such provision; and as it is required

(*u*) Ramsbottom *v.* Davis, 4 M. & W. 584; Peate *v.* Dicken, 1 C., M. & R. 422; Waddington *v.* Francis, 5 Esp. 182.

(*v*) Davis *v.* Williams, 13 East, 232. Several persons signed an agreement to subscribe different sums for the purpose of building a wet dock, as follows: "We, whose names are hereunto set, agree to subscribe the sums against our names," &c. It was held to be liable to stamp-duty as a single instrument, although operating separately as to each person. Bowen *v.* Ashley, 1 B. & P. N. R. 274; Cook *v.* Jones, 15 East, 237.

(*w*) Baker *v.* Jardine, 13 East, 235, n. (b); Ib. 238, n. (a)

(*x*) Goodson *v.* Forbes, 6 Taunt. 171; 1 Marsh. 525. All the underwriters on a marine policy agreed by one instrument, having only one stamp, to refer the question in dispute between them and the insured to arbitration. It was held, that one stamp was sufficient, as all parties had a community of interest in the matter insured; all had an interest in its preservation; and none would be answerable so long as it remained secure; and, though each was answerable only for his own subscription in a court of law, all were alike interested in the subject-matter.

(*y*) Doe *v.* Day, 13 East, 241.

(*z*) Rex *v.* Reeks, 2 Ld. Ray. 1445; Perry *v.* Bouchier, 4 Camp. 80.

that agreements shall be stamped at the rate of five cents for every sheet or piece of paper, we presume that every letter which is essential to establish the terms of the agreement, or contract, must bear its appropriate stamp.

If a contract be void for want of a proper stamp, an action may be had upon the common counts, and the plaintiff may recover, if he can prove his claim without the aid of the unstamped writing. (*a*) And when a plaintiff has proved, by witnesses, a case of implied or oral contract, he cannot be non-suited by the defendant's producing an unstamped written instrument, purporting to contain the terms of the contract. (*b*) But if the existence of the unstamped written contract be brought out on the cross-examination of a witness for the plaintiff, it seems that the latter will be non-suited; the absence of the writing being thus made an inherent defect in his case, which it is incumbent on him to get over. (*c*)

SECTION V.

STAMPS ON BILLS, NOTES, CHECKS, AND MONEY ORDERS.

On any bank check, draft, or order, for the payment of any sum of money exceeding twenty dollars, drawn upon any bank, company, or person, at sight or on demand, the law requires a two cent stamp to be affixed and cancelled by the maker before issue. Any order for the payment of a sum exceeding twenty dollars, no time of payment being specified, would probably be rightly stamped as a demand order; on the principle that a promise to pay money, not specifying time, is held to be a promise to pay on demand. (*d*) If, however, there were any

(*a*) Alvez *v.* Hodgson, 7 T. R. 241. The court held that, though the plaintiff could not recover upon a written contract for payment of wages, made in Jamaica, which, by the laws of that island, was void for want of a stamp, yet he might recover upon account for a *quantum meruit*. Brown *v.* Watts, 1 Taunt. 353; Wilson *v.* Kennedy, 1 Esp. 245; Tyte *v.* Jones, 1 East, 58, n.

(*b*) Fielding *v.* Day, 6 Bing. 332.

(*c*) Per *Tindal*, C. J., 6 Bing. 332; Rex *v.* Rawdon, 8 B. & C. 708; Vincent *v.* Cole, 1 Mov. & M. 257; 3 C. & P. 481.

(*d*) 1 Parsons, Notes & Bills, 381.

arrangement or understanding between the parties, at the time the order was issued, as to a time being given before payment, a simple demand rate might be held insufficient, on the ground that the arrangement was an evasion of the stamp law. (*e*)

On any inland bill of exchange, draft, or order, for over twenty dollars, not payable at sight or on demand, if payable at any time not exceeding thirty-three days from date or sight, including grace, the amount of stamp duty is one cent for every two hundred dollars, or fractional part thereof; and the rate increases with the length of time, up to six months and grace, for which time it is six cents. Over that time, the rate is ten cents, and fixed. (*f*)

On any promissory note, memorandum, check, receipt, or other written or printed evidence of *any* amount of money, to be paid *on demand*, or at a time not exceeding thirty-three days from date, including grace, the amount of stamp duty is one cent for every two hundred dollars, or fractional part thereof, with the same increase of rates for longer time, as in the case of inland bills, &c. (*g*) It will be noticed that promissory notes, memorandum checks, and other like evidences of money to be paid, must be stamped, though under twenty dollars, and whether on demand or on time. These requirements are made by an act in amendment of the original statute. (*h*)

On a foreign bill of exchange, or letter of credit, drawn in, but payable out of the United States, if drawn singly, or otherwise than in a set of three or more, according to the custom of merchants and bankers, the same rate of stamp duty is imposed as for an inland bill or promissory note, with the same variations for amount, and length of time from date or sight. (*i*) If drawn in a set of three or more, for every part of the set a stamp is required, proportioned to the amount of the bill, but having no reference to the length of time of payment from date or sight. (*j*)

By the law-merchant it is well settled, that the States of the Union are foreign to each other in respect to bills of exchange.

(*e*) Boutwell's U. S. Tax System, 346.
(*f*) Act of March 3d, 1863, § 6.
(*g*) Act of March 3d, 1863, § 6.
(*h*) Act of March 3d, 1863, § 6.
(*i*) Act of July 1st, 1862, Sched. B; Act of March 3d, 1863, § 6.
(*j*) Act of July 1st, 1862, Sched. B.

The words of the stamp act, however, would seem to indicate that only those bills and letters of credit are to be regarded as foreign, which are drawn in, and payable out of the United States. Upon a careful consideration of the provisions bearing upon this subject, we think it will appear, that it was not the intention of Congress to establish a new criterion for determining what are foreign bills, by the terms employed. The paragraphs of Schedule B, relating to this matter, are as follows:

"Bills of exchange (foreign) or letters of credit, drawn in but payable out of the United States, if drawn singly, or otherwise than in sets of three or more, according to the custom of merchants and bankers, shall pay the same rate of duty as inland bills of exchange or promissory notes."

"If drawn in sets of three or more: For every bill of each set, where the sum made payable shall not exceed one hundred and fifty dollars, or the equivalent thereof in any foreign currency in which such bills may be expressed, according to the standard of value fixed by the United States, three cents," &c.

Now if the terms *inland* and *foreign*, as applied in this statute to bills of exchange, are construed so as to express the same meaning as has been conclusively established for them by the law-merchant of this country, both by adjudication of the Supreme Court of the United States, and of the courts of many of the States, (*k*) it would follow, that by *inland bills* is meant those payable in the same State or Territory where they are drawn; and by foreign bills, all that are not so payable, whether drawn at home, or drawn and payable abroad. We see nothing on the face of the statute which forbids this interpretation, though it is also susceptible of the one first indicated. The phrase "drawn in but payable out of the United States," does not necessarily apply to "bill of exchange (foreign)," but may well be restricted to the words "letter of credit," which next precede it. Thus restricted, it performs an appropriate function in clearly defining what is commercially known as a "letter of credit," as distinguished from an order for the payment of money; the latter being the form usually adopted for providing

(*k*) 1 Parsons, Notes & Bills, 56, 57.

funds for a distant party who may need them, within the country, while the former is more generally resorted to for a similar purpose, for a party abroad. It will be noticed also, that the words "letter of credit" are not used in the second paragraph above quoted, which fixes the rate where "bills" are drawn in sets of three or more. This omission has a tendency to strengthen the conclusion, that the phrase "letter of credit drawn in but payable out of the United States," was intended to embrace a subject of taxation entirely distinct and independent of foreign bills of exchange. It is true that the English statute, which is supposed to have served as a model for our own, used the terms "drawn in but payable out of Great Britain," to describe one kind of foreign bill of exchange; but the scope of these words is not coextensive with the united kingdom, and their effect is, to render a bill drawn or payable in Ireland, a foreign bill; just as the law-merchant of this country makes a bill drawn, or payable in New York, foreign in Massachusetts. Therefore there is no argument from analogy, and we are left to seek an independent meaning of the terms referred to, as imported into our law. In seeking this meaning, if no violence be done to the language of the statute, it is certainly more proper to give to the words *foreign* and *inland* their full and well-settled legal value, as applied to bills of exchange, than to impose a peculiar, restricted, and incongruous meaning upon them. By the construction here suggested, the intention of the law, which is manifestly to tax all bills of exchange, is preserved; whereas, if the term "foreign bills" is restricted to those drawn in, but payable out of the United States, then the large class of bills drawn between the different States and Territories, legally known as foreign bills, might entirely escape taxation.

Practically, it may be of little importance, except in a few isolated cases, whether bills drawn between the several States are regarded as foreign or inland; because such bills are seldom drawn in sets of three or more, and therefore must, by the terms of the act, whether deemed to be foreign or inland, be stamped with the rates provided for inland bills or promissory notes. The same remark may be made with reference to another class of foreign bills, drawn abroad, and payable here or

abroad, which may come to this country for acceptance, negotiation, or payment; for the act provides that such bills, without regard to the question, whether they are drawn in sets of three or more, shall be stamped before acceptance, payment, or negotiation here, as inland bills or promissory notes. (*l*)

As to the question, whether inland bills drawn and payable in the same State, and those foreign bills which are specially made liable to the duty on inland bills, if drawn in duplicate or other sets, must be stamped with the inland rate upon each part of the set, we can only say, that there is nothing in the statute which requires that any second or third part of an inland bill or any second part of a foreign bill, drawn in duplicate, shall be stamped with a triplicate or duplicate inland rate. The act provides multiplicate rates solely for foreign bills drawn in sets of three or more, according to the custom of merchants or bankers; and for these, where drawn abroad and sent to this country for acceptance, negotiation, or payment, an exception is made, by the provision that they shall be stamped here as inland bills or promissory notes. (*m*) Inland bills, as known to the law, are seldom if ever drawn in sets; but if, for any special purpose, that were to be done, it would be altogether safer to stamp all the parts of the set, because, under the general invalidity imposed by the statute, no second or third part that was unstamped, could be relied upon for any legal purpose, other than as secondary evidence upon proof that the stamped original was lost, or destroyed. (*n*)

In addition to the general penalty for making, signing, or issuing any instrument liable to duty, without using and properly cancelling an appropriate revenue stamp, a special penalty of two hundred dollars is imposed by the statute upon any person who shall, with design to evade any stamp duty, make, sign, or issue, accept or pay, any bill of exchange, draft or order, whether drawn abroad or in this country, promissory note, memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid, liable to any of the

(*l*) Act of July 1, 1862, § 101.

(*m*) Act of July 1, 1862, § 101.

(*n*) Mann *v.* Godbold, 11 Moore, 4?; Garmons *v.* Swift, 1 Taunt. 507; Waller *v.* Horsfall, 1 Camp. 501.

duties imposed by the act, without the same bearing a proper stamp. (*o*) A special penalty of one hundred dollars, without reference to wrongful intent, is imposed upon any person who shall pay or offer in payment, or receive or take in payment, any draft or order for the payment of any sum of money drawn abroad, but payable in the United States, without placing thereupon a proper stamp. (*p*) The power to stamp any such document made abroad, before use in this country, is given to the party by whom it is to be used, by an amendment to the original law. (*q*)

An unstamped bill or note being a nullity, if made in this country, there can be no obligation to present it, and indorsers cannot be held upon it. (*r*) From this it follows, that a failure to make demand, or give notice, cannot affect the rights or obligations of indorsers upon such paper. The instrument being void, the original obligation, which might have been extinguished or qualified by a valid bill or note, would revive in full force; and every party, maker, or indorser, whether notified or not, would be liable upon any consideration which had passed to him as the cause of his becoming a party to the instrument. (*s*)

Any material alteration of a note or bill, after its issue, will invalidate the stamp, and render a new stamp necessary, unless such alteration is merely to correct a mistake, and make the document what it was originally intended to be. (*t*) Thus, a promissory note, payable to plaintiff or order, and originally expressed to be for value received generally, having been altered the next day after delivery, by the insertion by the makers, of

(*o*) Act of July 1, 1862, § 100; and by § 6 of the Amendatory Act of March 3, 1863, any memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid on demand, or at a time designated, is declared to be a promissory note, for the purposes of the stamp law. A bank check is not specially mentioned in the section imposing a penalty of $200, for fraudulently issuing or paying without a stamp; the general description may, perhaps, be held to cover it.

(*p*) Act of July 1, 1862, § 101.

(*q*) Act of March 3, 1863, § 6; which provides, that a document of any kind, made abroad to be used in the United States, shall be stamped by the party using the same, for the same amount of duty as is required for similar instruments made or issued within the country.

(*r*) Wilson *v.* Vysar, 4 Taunt. 288; and see per Lord *Tenterden*, C. J., in Holdsworth *v.* Hunter, 10 B. & C. 449.

(*s*) Cundy *v.* Marriott, 1 B. & A. 696; Brown *v.* Watts, 1 Taunt. 352; Wilson *v.* Kennedy, 1 Esp. 245.

(*t*) Bayley on Bills, 91.

the words "for the good will of the lease and trade," was held to require a new stamp; the words being a material alteration, and having been inserted in pursuance of a new intention. (*u*) An alteration of a bill by the drawer, after it had been accepted, and while in the hands of the drawer, whereby the date was changed, was held to constitute a new instrument, and to require a fresh stamp; the change not having been made to correct a mistake, though agreed to by the acceptor. (*v*) So an alteration of the time which a bill is to run, if made after issue, and in pursuance of a new intention, though with consent of parties, destroys the stamp. (*w*) And a promissory note, signed by a surety while in the hands of the payee, unless the signing by the surety was a part of the agreement in which the note originated, will be void without an additional stamp. (*x*)

Where the alteration is made to correct a mistake made in drawing the bill or note, even after the issue of the instrument, all parties consenting, a new stamp is held to be unnecessary. Thus, where a bill was drawn, payable to the defendant, the words "or order" being accidentally omitted, which omission was rectified after the defendant had indorsed the bill to the plaintiff, all parties consenting thereto, the court held that a new stamp was unnecessary. (*y*) The principle of this decision is distinctly admitted in subsequent cases involving the question of correcting mistakes by consent of parties. (*z*) In an

(*u*) Knill *v.* Williams, 10 East, 431.

(*v*) Bathe *v.* Taylor, 15 East, 412.

(*w*) Wilson *v.* Justice, cited Bayley on Bills, 91 n.; Bowman *v.* Nicoll, 5 T. R. 537. An acceptance, dated September 2, in the hands of the drawer, was, by consent of the acceptor, altered from twenty-one days after date to fifty-one. Before it fell due, it was again altered to twenty-one days, and the date changed to September 14th, the original stamp being retained. The bill was held to be void.

(*x*) Clark *v.* Blackstock, 1 Holt, N. P. C. 474.

(*y*) Kershaw *v.* Cox, 3 Esp. 246. A bill having been drawn payable to the defendant, the words 'or order,' were accidentally omitted. The defendant endorsed it over to the plaintiff, on the day following, and the latter, upon discovering the omission, returned it for correction. The drawer then inserted the words 'or order;' and the jury having found that the omission was made by mistake, and the correction made to carry out the original intention of the parties, the court held the alteration allowable, and that a new stamp was not necessary.

(*z*) Byrom *v.* Thompson, 11 A. & E. 31. In this case, a promissory note on demand, made by the defendant, was accidentally written without the words "or order," and some five months afterwards the plaintiff returned the note to the defendant, for the purpose of having the omission supplied, which was accordingly done. The alteration was held to be within the principle of Kershaw *v.* Cox, and to have been made solely to correct a mistake. Viall *v.* Thompson, 3 Jur. 1121; Cariss *v.* Tattersall, 2 M. & G. 890; 3 Scott, N. R. 257

action by an indorsee against an acceptor, it appearing that the common agent of the drawer and acceptor, to whom the bill, duly stamped, was intrusted to be delivered to the plaintiff, had, before handing it over, altered the date of the year so as to correct what was known to him to be a mistake, and the jury having found that the year, as originally written, was a mistake, the court held that the bill was not vitiated. (*a*) Where an agreement was made for a bill of exchange, and the defendants, who were partners, sent the plaintiff instead thereof, a promissory note signed by one and endorsed by the other member of the firm, which document was returned by the plaintiff, and subsequently changed into the form of a bill, by altering the phraseology, and in that shape received by him; the court held the stamp sufficient, for the reasons that every thing was *in fieri*, and that the change was merely a correction to fulfil the terms of the agreement. (*b*) But if any one of the parties to a bill or note does not consent to a material alteration for correcting a mistake, whether it be made before or after the issue, the instrument will be void. Thus, where by agreement between the parties, a joint and several note was to be given by the directors of a joint stock company, and the note was by mistake drawn as a joint note, and so signed by the defendant and all the other directors but one, the secretary afterwards interlining the words "jointly and severally," without the knowledge or consent of the defendant, in which state it was issued; it was held, that by the alteration the note was destroyed. (*c*)

An alteration in a bill, not adversely affecting the amount of the stamp, may be made for any cause, before it is accepted or negotiated, without requiring a fresh stamp. (*d*) And as an accommodation bill does not issue as an available security until it is negotiated for *value*, an alteration, previous to that time, does not render a new stamp necessary. (*e*) If, for example, A draws, B accepts, and C and D indorse a stamped bill for the

(*a*) Brutt *v.* Picard, Ry. & M. 37.

(*b*) Webber *v.* Maddocks, 3 Camp. 1.

(*c*) Perring *v.* Hone, 2 Car. & P. 401; 12 Moore, 135.

(*d*) Johnson *v.* Duke of Marlborough, 2 Stark. 313.

(*e*) Downes *v.* Richardson, 5 B. & Ald. 674; Johnson *v.* Garnett, 2 Chit. 122; Johnson *v.* Gibbs, 2 Chit. 123.

accommodation of the latter, the signatures of A, B, and C, being wholly without consideration, and D then negotiates and delivers the bill for his own benefit; any alteration which may have been made in it by consent of the parties before such negotiation, would not invalidate the stamp. And it is probable, that if such an accommodation bill were stamped for the first time, when indorsed by D, for value, no penalty would be incurred by either of the prior parties, for signing without a stamp, and no objection be sustained to the validity of the bill, in consequence thereof. D being the only party who issues the bill, it would seem that he alone need stamp it, or would incur the penalty for neglect.

Where, however, two parties exchange acceptances, drawn by each upon the other, and afterwards, before negotiating them to third parties, by mutual agreement, alter the time of payment by post-dating them, the bills are held to be void unless restamped as new bills. In this case the principle of accommodation paper does not attach; for the delivery of one acceptance for the other, is considered as a negotiation for value, which fully appropriates the stamp. (*f*)

The question, whether a stamped negotiable instrument can be reissued after payment, is settled by the English stamp law, which forbids the reissue of any paid notes, bills, drafts, or orders for money, except certain notes payable to bearer on demand, under heavy penalties. (*g*) In the absence of any such provision in our stamp act, it is worthy of consideration, whether the principles of the common law, as applied to negotiable paper, would not prevent a bill or note once paid off, and afterwards reissued, from having any validity; for payment by the party ultimately liable is regarded as an extinguishment of the note or bill, and if so, it cannot be again made use of. (*h*) At all events, as payment would exhaust the stamp, it might be a question, whether a payor who should reissue a paid note or bill under the old stamp, would not be amenable under the stamp act to the charge of felony, for using an exhausted stamp

(*f*) Cordwell *v.* Martin, 1 Camp. 79; 9 East, 190; Calvert *v.* Roberts, 3 Camp. 343.

(*g*) 55 Geo. 3, ch. 184, §§ 14, 19.

(*h*) 2 Parsons, Notes and Bills, 216 237; Bartram *v.* Caddy, 1 Per. & D. 207

with intent to defraud the United States. (*i*) It would seem, however, that a bill or note, though overdue, might be reissued without a new stamp by any party paying the same, except the one ultimately liable; and that the holder, after such reissue, might have all the legal remedies against any parties thereon, which the law allows in any case of dishonored paper. (*j*) As we have stated elsewhere, the true principle must be, that a note or bill, which has been duly stamped, may afterwards be used to any extent, or used in any way which may fairly be regarded as a use of the same bill or note. But an instrument once stamped and issued cannot afterwards be employed in an original or independent use; or in other words, it cannot be used for the purposes and in the manner for which a new instrument might more properly be made, and probably would be, but for the requirement of the stamp; for this would be an unquestionable evasion of the statute. (*k*)

It is held, under the English statutes, that the indorsement of an accepted bill to a new party, by the drawer thereof, after dishonor, the bill being originally payable to his own order, and having been paid by him, is a valid use of the bill under the original stamp. (*l*)

A negotiable bill or note, payable generally, or without any specification as to time, is held so conclusively to be payable on demand, that no evidence to the contrary can be received. (*m*) Such a document is therefore regarded as sufficiently stamped with the appropriate rate for a demand note. (*n*) But if such a document were made with an understanding between the parties that there should be no present demand, and with a design to evade the stamp act, we apprehend that the above stringent rule of the law-merchant, which, in a suit between the parties, refuses to receive evidence to vary their relations toward each

(*i*) Act of July 1st, 1862, § 99.

(*j*) Thomas *v.* Fenton, 5 Dow. & L. 28.

(*k*) 2 Parsons, Notes & Bills, Appx. xv.

(*l*) Callow *v.* Lawrence, 3 M & S. 95. In this case the acceptance sued upon was payable to the drawer's own order, and he was the first indorser. Upon its dishonor in the hands of a subsequent indorsee, he paid the bill, and afterwards struck out the names of all the indorsers except his own, and negotiated it anew. The holder sued the acceptor, and it was held that a new stamp was not necessary, as the bill had not done its office. See also, Williams *v.* James, 15 Q. B. 498; Jones *v.* Broadhurst, 9 Com. B. 173.

(*m*) 1 Parsons, Notes & Bills, 381.

(*n*) Whitlock *v.* Underwood, 2 B. & C. 157; East *v.* ———, 2 Man. & R. 8.

other, as exhibited by the terms of the note, would not operate to exclude evidence as to the intention of the parties, in a prosecution under the penal clauses of the statute.

If a bill or note is payable with interest, it is held, that the principal expressed upon the face, is nevertheless the true measure of the stamp duty. (*o*) The principle of this decision, as given by *Abbott*, C. J., is, that the object of the law being to impose a *pro rata* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money, the words "sum of money," in the act, must mean the principal sum mentioned in the note, and not a sum compounded of principal and interest. (*p*) It has also been held, that where a note reserves interest from a day *prior* to the date, a stamp applicable to the principal is sufficient. (*q*) Upon the principle that where the words in the body, and the figures in the margin of a note, vary, the words are to be taken as the correct expression of the amount, (*r*) it would undoubtedly be held, that a stamp, answering to the amount expressed by words, would be a sufficient compliance with the statute.

A promise to account in a written acknowledgment of borrowed money, is held in England not to bring the document within the stamp act as a promissory note. (*s*) But the very comprehensive terms of our law, making "any memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid," (*t*) liable to stamp duty as a promissory note, would probably be held to include a document of that kind, as well as an ordinary memorandum check, or "borrowed and received" receipt given for money loaned. A check dated or payable ahead, is not classed as a "bank check" in the schedule of the United States law, which defines a bank check as an order on a bank, payable at *sight or on demand;* and it must therefore be subject to tax as a promissory note, under the provision above quoted. The Commissioner of Internal

(*o*) Preussing *v* Ing, 4 B. & Ald. 204.
(*p*) Preussing *v.* Ing, 4 B. & Ald. 204.
(*q*) Wills *v.* Noot, 4 Tyrr. 726; Foreman *v.* Jays, 5 Car. & P. 419.
(*r*) 1 Parsons, Notes & Bills, 27.
(*s*) White *v.* North, 3 Exch. 689.
(*t*) Act of March 3d, 1863, § 6.

Revenue has taken this view of the law, and has also decided that demand loans, made on checks stamped as such, are an evasion of the law, if made with an understanding that the check is not to be presented till a future time. (*u*) The Commissioner has also decided, that a renewal of a promissory note must be stamped as a fresh note; (*v*) and this we think must be correct, even where the original note, by being made before the law took effect, bore no stamp. And we can have no doubt that a note expressed to be for the payment of a definite sum of money, or of a sum that may be ascertained from the terms of the note, payable in merchandise, securities, or any thing else of value, should bear an *ad valorem* stamp; but we cannot think that a mere promise to pay so much merchandise, with no reference made to its money value, can be regarded as a promissory note, within the meaning of the statute. Such, however, appears to be the ruling of the Commissioner of Internal Revenue. (*w*) We are not certain that the Commissioner means to say, that a note promising to pay one thousand bushels of corn, and one promising to pay one thousand dollars in corn at one dollar per bushel, are the same thing under the stamp law. We think there is a difference.

A bill payable upon any contingency, cannot be regarded as a bill within the meaning of the law merchant; (*x*) but we apprehend that such a document might be viewed as an order, and under the head of "order for the payment of any sum of money exceeding twenty dollars otherwise than at sight or on demand," be held, under our statute, to be liable to the same stamp duty as a single bill of exchange. There is an obvious difference between a bill of exchange and a simple order for the payment of money; the former requiring certainty as to the payor, the payee, the amount, and the time and fact of payment. (*y*) An order that includes all these certainties, is regarded by the law merchant as a bill of exchange; but it may still be an order, imposing obligations and conferring rights, if one or more of these certainties are wanting; as, for instance, certainty as to the fact of

(*u*) Boutwell's U. S. Tax System, 346.
(*v*) Boutwell's U. S. Tax System, 339.
(*w*) Boutwell's U. S. Tax System, 342.
(*x*) 1 Parsons on Notes & Bills, 42.
(*y*) 1 Parsons on Notes & Bills, 30.

payment. If, however, an order to pay at a future time, is absolutely uncertain as to amount, we see not how it can require an order stamp, for there is no sum upon which the *ad valorem* duty can be calculated. This has been decided in England, and we doubt not that our courts would hold the same doctrine. (*z*)

A written direction to pay money to another, not given to the payee or any one on his behalf, but sent to the party who is to pay, is not regarded as an order requiring a stamp. (*a*) Nor would a letter, sent by one party to another, directing the latter to remit a definite sum of money to the former, come under the denomination of an order, so as to require an *ad valorem* stamp, even were time given for the remittance, by the terms of the letter. (*b*)

Although the United States Statute does not contain any clause, like that in the English Stamp acts, putting orders for the payment of money upon contingency, and orders for payment in securities, upon a par with bills of exchange as to stamp duties, yet it is a matter of some doubt if any order for the payment of a sum of money over twenty dollars, payable otherwise than at sight or on demand, whether to be paid out of a particular fund, or upon any contingency, or in securities, or even in goods, can safely be issued by the maker without an *ad valorem* stamp. With respect to documents in the shape of promissory notes, which, by reason of any of the circumstances above enumerated, would fall without the legal definition of a promissory note, the amending act has provided, by including "any written or printed evidence of an amount of money to be paid," under the description of promissory notes, for the purposes of the stamp act. (*c*)

(*z*) Crowfoot *v.* Gurney, 473. The defendant, in this case, had received through the hands of another party, an order from his creditor, to pay the balance due him to that party, and stating that the receipt of the latter should be a sufficient discharge. The claim was for work and materials, and the amount was uncertain, at the time the order was given. The defendant agreed to pay as directed, but before payment was made, the creditor failed, and his assignees claimed the balance as part of the bankrupt's assets, and sued for the same. It was objected, that the order was not stamped as a bill of exchange, and therefore void. But the court held, that the document did not require such a stamp, and gave judgment for the defendant.

(*a*) Jones *v.* Simpson, 2 B. & C. 318.

(*b*) *Ex parte* Swan, 1 Dea. 751.

(*c*) Act of March 3d, 1863, § 6.

A maker of a note, issuing the same without a proper stamp, however innocently, would incur the penalty of fifty dollars prescribed in section 95, for so doing, as the words "with design to evade the payment of any stamp duty," are not used in this connection. This penalty is evidently designed as a check upon carelessness, and not as a punishment for fraud; the latter being provided for by the more comprehensive words of section 100, which impose a penalty of two hundred dollars. It is doubtless within the power of the maker of an unstamped note, to call it in, and affix to it the proper stamp. This would render the note valid from the time of stamping and reissue, but might not operate to fix any prior parties thereon, who did not assent to and authorize this subsequent stamping.

If a bill or note, not properly stamped, be given in payment of a debt, though the receiver may not be able to recover upon the instrument itself, his claim is not thereby lost, but may be enforced under the common counts, sustained by other evidence on the transaction. (*d*) And where a promissory note was given without a stamp, and a memorandum was indorsed in the handwriting of the maker, that he had paid a certain sum for interest, it was held, that the memorandum might be read as an admission that a principal sum was due, which would yield so much interest. (*e*)

It has been held in England, that a negotiable instrument, stamped subsequently to the time of its issue, is good in the hands of an indorsee for value, who receives it in ignorance of the fact that it was not stamped until after issue, and there being nothing on the face of the instrument to show that it was post-stamped. (*f*) This decision would seem to rest upon the well-

(*d*) Wilson *v.* Kennedy, 1 Esp. 245; Tyte *v.* Jones, 1 East, 58, n. In this case, the court admitted evidence of the defendant's acknowledgment of the debt at the time the note was presented.

(*e*) Manly *v.* Peel, 5 Esp. 121.

(*f*) Wright *v.* Riley, Peake, 173. Assumpsit against the defendant as indorser of a bill of exchange. The bill, when produced in evidence, appeared to be properly stamped, but defendant proved that it was not stamped when drawn, nor for some time afterwards. It was contended that the bill was absolutely void, and could not be made good by the stamp impressed upon it after it was drawn, as the statute required that the paper on which a bill is written shall be stamped before the bill is drawn; and also provided, that it shall not be lawful for the commissioners of stamp duties to stamp any paper on which a bill is written, after the same is drawn. Lord *Kenyon* said, "that though the commissioners might have exceeded their duty in stamping the bill, against the positive directions of the stat-

settled principle of the law merchant, that negotiable paper in the hands of an innocent holder for value before dishonor, is free from all defences that do not arise upon the face of the paper. It virtually declares, that when the proper evidence, required by the stamp act, is exhibited by the note itself, there is a conclusive presumption of law that the duty has been duly paid. It incorporates into the law merchant, among the other certainties which negotiable paper must exhibit upon its face, the additional certainty that the paper is duly stamped; and this certainty being demonstrated by the stamp borne upon the paper at the time it is taken by an innocent holder for value, the law then declares, that it shall not be subsequently called in question.

In favor of this view, it must be kept in mind, that it is the note alone which is declared by the statute to be invalid if not stamped, and not the contract of which it would otherwise be the evidence. The laws against usury, gaming, or other illegal acts, if they make the note given for the illegal consideration void, make the contract itself equally so. It is otherwise with the stamp act. If the contract itself, or the assignment thereof, can be proved by other evidence *dehors* the note, the want of a stamp on the latter cannot defeat the enforcement of the former

ute, still, that being stamped, he thought it became a valid instrument; and a judge at *Nisi Prius* could not inquire how, and at what time it was stamped. Much inconvenience might arise, and a great check be put upon paper credit, if the objection was to be allowed; for how was it possible for a man, taking a bill in the ordinary course of business, to know whether it had been stamped previous to the making of it or not? A verdict was found for the plaintiffs. In Green *v.* Davis, 4 B. & C. 235; 6 D. & R. 306; the plaintiff, an executrix, sued the maker of a promissory note belonging to the estate of her testator, which showed, on the face of it, that it had been stamped as a note subsequent to the time when the testator received it from the promissor. The court held, that, as it appeared on the face of the note, that it had been issued without a proper stamp, and as the commissioners had no power to affix the stamp subsequently, the note could not be received in evidence, either as a promissory note, or in support of the money counts. In reference to the case of Wright *v.* Riley, as decided by Lord *Kenyon*, the court say: "The case before Lord *Kenyon* was quite different. There, though the bill was stamped after it was drawn, which was improper, it was stamped with a regular bill stamp. There was nothing upon the face of the bill to show that it had not had that stamp upon it at the time it was issued; and the bill was a negotiable bill, and in the hands of an indorsee, and there was nothing to show that the plaintiff took it before it was stamped." The case of Roderick *v.* Hovell, 3 Camp. 103, was an action by an insurance broker against the insured, to recover premiums due upon a policy of insurance which was not stamped at the time of its issue; and the court held, that the plaintiff could not recover, as the policy was not stamped when it was effected.

If the invalidating of an unstamped note is to be considered as a penalty, then it must be a penalty upon the receiver, and not on him who gives the note; for in almost every instance the former must be the one who suffers by the invalidity, and not the latter. Besides, there are special pecuniary penalties imposed upon the latter for his share in the transaction. If this be the correct view, then the statute virtually says to the receiver of an unstamped note, "you shall not use the note to prove your claim, because you have taken it without the proper duty having been paid upon it." The stamp is the evidence that the duty has been paid, and this penalty is imposed upon the receiver for taking the note without that evidence upon it. If he stamps it while it is in his possession, and then negotiates it to one who takes it without any knowledge that the stamp was not duly affixed when the note was first issued, that indorsee receives the document with the legal evidence upon it that the stamp duty has been duly paid, and therefore is not guilty of the act against which the law denounces the penalty of invalidity. It may be objected to this view of the subject, that the receiver of unstamped paper would thus be enabled to give a better title than he himself has; but to this it might be answered, that the same thing is allowed by law, for the protection of innocent parties, in the case of negotiable paper obtained by fraud or theft. Such paper is invalid in the hands of the guilty party, but that party can nevertheless give a good title to a *bona fide* taker. (*g*)

It is possible, also, that the doctrine of estoppel might come in, to prevent the maker or negotiator of unstamped paper from interposing the objection of want of stamp when issued, against the claim of an innocent holder, who received the paper with a proper stamp thereon. Where the paper has not been stamped at any time, the maker or indorser is not estopped from making the defence of want of stamp; (*h*) but this proceeds upon the consideration, that the interest of the government, in the matter of revenue, is involved in the objection; and as the interest of the government is not concerned in a case where the full amount

(*g*) Parsons on Notes & Bills, 279, 280.

(*h*) Steadman *v.* Duhamel, 1 C. B 888; Bennison *v.* Jewison, 12 Jur. 485.

of stamp duty has been eventually paid, the principle of estoppel may perhaps apply. As the object of the stamp acts is solely to raise revenue, and not for the regulation of business transactions, it may be, in a case of this kind, where the object of the law has been accomplished, that a party who is not only innocent of design, but ignorant of the act whereby that object might have been defeated, should be protected from the admission of parol evidence in favor of an interested and culpable party, to overcome the documentary evidence, required by law, as to the due payment of a stamp duty.

After all this it remains, that the words of the statute, which make the note, if *issued* without the stamp, "invalid and of no effect," distinctly oppose the conclusion to which the English courts seem to be led by their tenderness for the privileges of negotiable paper. We should doubt whether courts of this country would go so far as to permit the policy of the law to set aside an express provision of the law, and, upon the whole, we do not believe our courts would go further than to apply a distinction analogous to that applied to usurious notes, when they are declared by the statute to be wholly void. Then, an action cannot be maintained on such a note, by an innocent holder, against the maker, but may against an indorser, because each indorser is considered, for some purposes, as making a new note. (*i*)

Letters of credit being regarded as bills of exchange, (*j*) those that are specially designated as subject to stamp duty, in schedule B, of the United States' statute, namely, those drawn in, but payable out of the United States, must, of course, have the same certainties as to amount, parties, and payment, as bills of exchange, in order to be liable to stamp duty as such. The English statute describes a letter of credit as a document whereby one person authorizes another to have credit with, or draw upon a third person, for any sum of money mentioned therein; (*k*) and we observe, that the United States Commissioner of Internal Revenue, construes the act as referring to such letters as are equivalent to a bill of exchange, the payment

(*i*) 2 Parsons on Notes & Bills, 407.
(*j*) Ellison *v.* Collinridge, 9 C. B. 570.
(*k*) 16 & 17 Vict. ch. 59.

of which is not contingent upon any other transaction. (*l*) The term *inland* letter of credit not being used in our law, we presume, that any document answering to that description, would be properly stamped as an order for the payment of money, if sufficiently definite in its terms. A foreign letter, if for an indefinite and unlimited amount, should probably be stamped as an agreement, if delivered to the party by whom it is to be used; and if for a sum otherwise uncertain, but not to exceed a definite amount, we should say that the stamp must be for the amount so expressed.

SECTION VI.

STAMPS ON COMMERCIAL DOCUMENTS.

The statute imposes a stamp duty of ten cents upon a contract, note, or memorandum of sale of property of any kind, issued by a broker or any person acting as such. Under this specification, it may be questionable whether any stamp is required upon a memorandum of sale, made by a broker in his own books, such making not being an issuing on his part. And yet, such a memorandum would be binding in law upon the principals, if duly signed by the broker. We notice, however, that the Commissioner of Internal Revenue has ruled, that such a memorandum of purchase and sale must be regarded as within the meaning of the clause, and subject to a stamp tax of ten cents. (*m*) The stamp duty is regarded as applicable, both to the note issued to the seller, and that to the buyer. (*n*)

Contracts for the sale of coin and bullion, and for loans of money upon pledge of coin of the United States, are placed under peculiar restrictions by the stamp law, as amended, and heavily taxed. (*o*) All loans of money, upon pledge of United States coin, for greater amount than the par value of the coin so pledged, are made utterly void; and all other contracts for loan upon pledge of United States coin, if for a longer period

(*l*) Boutwell's U. S. Tax System, 353.
(*m*) Boutwell's U. S. Tax System, 344.
(*n*) Boutwell's U. S. Tax System, 346
(*o*) Act of March 3, 1863, §§ 4, 5.

than three days, or if renewed, must be in writing signed by the parties, and stamped equal to one-half of one per cent. and interest for the term of the loan, upon the amount of money loaned. All contracts for the sale of coin and bullion, if to be performed after a period exceeding three days, must also be in writing signed by the parties, and stamped equal to one-half of one per cent. on the amount of money to be paid. All such contracts for loan or sale, not in conformity with these requirements, are declared to be void; and either party thereto may, at any time within one year from the date of the contract, have an action against the other, for the recovery of any money which he may have paid upon it.

These stringent provisions have grown out of the present abnormal state of the currency, and are designed to impose a check upon such dealings in specie as have a tendency to give it a factitious value as compared with legalized paper-money. It may be supposed, therefore, that they will be repealed, whenever the currency shall be restored to a specie basis.

The stamp duty imposed upon lottery tickets, and other like devices to represent an interest in schemes of chance, is fifty cents upon every dollar, and fraction of a dollar, of the price. If the stamp be not affixed by the maker or vendor, before disposing of the ticket to the purchaser, no prize which it may draw can be demanded or recovered by any legal proceeding or otherwise; but the holder may recover from the vendor a sum equal to double the price of the ticket, with legal costs, at any time within three years of the purchase. (*p*) The statute provides, "that no person shall make, sell or offer for sale, or dispose of any lottery ticket," without a stamp. The question has been presented to Mr. Commissioner Lewis, whether, in view of the fact that less than fifty per cent. of the tickets comprised in a scheme are actually sold, the stamp should be affixed to a ticket before a sale is actually secured for it? In other words, whether the dealer must keep his tickets ready stamped in his shop, or stamp each one as he sells it? In reply, the Commissioner gives his decision, that it need not be done until the sale

(*p*) Act of March 3, 1863, § 2.

is effected; that the stamp is to be affixed at the moment the ticket acquires legal efficacy, or begins to exist as an article of value. (*q*)

Every bill of lading, or receipt for goods to be exported to any foreign port, except in British North America, requires a stamp of ten cents, without reference to the value of the shipment. Bills of lading for shipments to domestic ports are not taxed; and in this respect, the statute differs from the English law. By an amendment to the statute, it is provided, that no stamp shall be required upon receipts given by railroad companies and other carriers, for freight to be transported by them. (*r*)

Bills of lading are usually taken in triplicate, and we presume that each part must bear a stamp in order to be of any legal value. An assignment indorsed on a bill of lading, is held in England to require an agreement stamp; (*s*) and the same would doubtless be the case under our law. Where, for want of a stamp, an indorsed bill of lading cannot be admitted as evidence of title to goods, in an action of trover, the plaintiff may prove his title by parol evidence. (*t*)

A bill of sale of a vessel is made liable to stamp duty by the amendatory act; (*u*) though not included in the original statute. The rate is twenty-five cents, where the consideration does not exceed five hundred dollars, fifty cents, if not exceeding one thousand dollars, with a progressive increase for every thousand or fraction of a thousand. It is ruled, by the Commissioner of Internal Revenue, that a bill of sale or deed of a vessel, given as security for money, must be stamped as a mortgage. (*v*)

Charter parties, and documents of equivalent import, are taxed with a duty of one dollar, if a vessel is not over one hundred and fifty tons register, with a progressive rate for vessels of larger tonnage, up to six hundred tons, for which the stamp duty is five dollars. For vessels of any larger tonnage than six hundred, there is a uniform rate of ten dollars. Our statute, like the English, imposes a stamp duty on all charter parties, whether for a foreign or domestic voyage.

(*q*) Boutwell's U. S. Tax System, 387.
(*r*) Act of March 3, 1863, § 6.
(*s*) Harris *v.* Birch, 9 M. & W. 591.
(*t*) Davis *v.* Reynolds, 1 Stark. 115.
(*u*) Act of March 3, 1863, § 6.
(*v*) Boutwell's U. S. Tax System, 346

Insurance policies, marine or inland, upon property of any description, whether against perils by sea or fire, or other peril of any kind, and all renewals of such policies, are taxed with an uniform stamp duty of twenty-five cents; (*w*) unless the premium or assessment does not exceed ten dollars, in which case a ten cent stamp is required. (*x*) By an amendment to the original act, it is provided that no stamp shall be required on deposit notes given to mutual insurance companies, upon which stamped policies are to be issued. (*y*) As to open policies, by which different risks are taken from time to time, as parts of one general amount represented by the policy, some diversity of opinion has arisen, upon the necessity, under the statute, of a separate stamp for each risk indorsed, and as to the necessity of any stamp when the policy is first issued, and before any risk has been indorsed thereon. The true doctrine would seem to be, that such a policy should be stamped when issued to the holder, and that no new stamp should be required thereon for any risk that he may have a right to indorse, within the terms and amount of the policy. If, by the terms of the open policy, the risk is subject to the approval of the insurer before it can be indorsed, and to the ascertainment of the rate of premium by the parties, still, the original instrument is that by which the insurance is effected, when these terms shall have been complied with; and as such, it must be liable to stamp when issued in exchange for the deposit note. Every policy of insurance is a contract upon condition; and it seems quite unreasonable to question whether it is a policy or not, within the terms of the stamp law, on the ground that one or more of the conditions expressed therein has not been complied with; for, *non constat*, that the condition will not be performed. The question whether, before these terms are complied with, there is a valid contract of insurance under the instrument, which could be enforced for the recovery of a loss, would not properly enter into the consideration of the propriety of stamping it under the statute; and therefore the decision of the U. S. Supreme Court, (*z*) that,

(*w*) Act of July 1, 1862, Sched. B.
(*x*) Act of March 3, 1863, § 6.
(*y*) Act of March 3, 1863, § 6

(*z*) Orient Ins. Co. *v.* Wright, 23 How. 401. The defendant in error, sought to recover of the plaintiff in error, for the loss

under such an open policy as this, there was no contract of insurance until the report, adoption of the risk, and fixing of the premium, does not meet the present question.

If the holder of an open policy issues a certificate of insurance under it to another party, it would undoubtedly be necessary, under the statute, that such certificate should be stamped, as an instrument by which insurance is made. Such a certificate is moreover equivalent to an assignment of an interest of the insured in the policy held by him, and as such is liable to the same stamp as the original policy. (*a*)

As we have already remarked, in Sect. IV., in treating of

of a cargo of coffee, which he claimed to have been insured under an open policy. The terms of the policy were for insurance on coffee, laden or to be laden on board the good vessel or vessels from Rio Janeiro to any port in the United States, "to add an additional premium if by vessels lower than A 2, or by foreign vessels;" and the policy also contained the following clause respecting premiums: "Having been paid the consideration for this insurance by the assured or his assigns, at and after the rate of one and one-half per cent.; the premiums or risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert, as the risks are successively reported." At the time the policy was made, the amount of insurance was fixed at $22,500; which, by subsequent additions, was increased to $62,500; and the premium notes were given upon that sum, at the rate mentioned in the body of the policy. The defendant in error, having procured several cargoes of coffee to be indorsed upon the policy, at rates mutually satisfactory, applied to the company for an indorsement on the policy, of the coffee in question, laden, or to be laden on board a vessel, called the Mary W., from Rio Janeiro to New Orleans. The company objected to this vessel, as being inferior in character, unfit for the voyage, and not coming within the description of the policy. But the defendant in error insisting upon the seaworthiness of the vessel, and his right to the insurance within the terms of the policy, the company fixed the premium at ten per cent., subject to the conditions of the policy, or two and one-half per cent., as against a total loss. The defendant in error, refused to agree to this rate of premium. The vessel was lost on the voyage by running on rocks, the master being some seventy miles out of his reckoning at the time. At the trial, before the U. S. Circuit Court for the District of Maryland, evidence was given, tending to prove that the vessel was rated below A 2, by insurers, and that she was very old, originally built for a coasting vessel, and unfit for a sea-voyage. Under the instructions of the court, that, if the jury found the vessel was seaworthy, the insured was entitled to recover for the loss, so far as the rate of premium was concerned, upon deducting such additional premium to the one and one-half per cent., as in the opinion of underwriters may be deemed adequate to the increased risk of the coffee, shipped in a vessel rating below A 2; the jury found a verdict for the insured. The case was brought by writ of error to the U. S. Supreme Court, where the judgment was reversed. The ground of reversal, as stated by *Nelson*, J., for the court, was, that under the special clauses of a policy like this, something more was required than the declaration of a ship rating lower than A 2, to bring the subject within the policy, and make a binding contract; the additional premium fixed by the company, was to be paid or secured. *Clifford*, J., dissented from the opinion of the court; holding that the judgment of the court below should be affirmed, on the ground that the company were bound to take the vessel if she was seaworthy, and that if the parties could not agree at the time the vessel was declared, what the rate of premium should be, it must be settled like other matters of controversy, by the judicial tribunals.

(*a*) Act of March 3, 1863, § 6.

agreements and contracts generally, the true consideration in determining the effect of an alteration made in a stamped instrument, is, whether the altered document is the original instrument to which the stamp was affixed, or a new one, by reason of the alterations, and therefore void for not being again stamped. In applying this principle to alterations made in policies of marine insurance, after stamping, great liberality has been exercised toward the insured by the English courts, and in the acts of parliament bearing upon the subject. (*b*) Thus, it has been held, that an alteration made in a policy, pending the risk, whereby for a further premium, the underwriters cancelled the warranty of the insured as to the time of sailing, and also added a new provision as to return of premium in case of convoy, did not subject the instrument to a new stamp. (*c*) And the addition, in the policy, of other places while the risk is pending, or of liberty to the vessel to put into certain ports, the underwriters consenting to the addition, is allowed without a fresh stamp. (*d*) So a memorandum indorsed by the underwriters, whereby for an increased premium a warranty of time of sailing was released, and the description of the goods varied, has been held to require no new stamp. (*e*) Where a policy was for a definite amount upon goods and specie, on board a ship or ships, first sailing within a specified time, a memorandum subscribed by the underwriter before notice of the determination of the risk, whereby the time of sailing was extended, was held good without a stamp. (*f*)

A mistake made by an agent, in declaring the interest to be

(*b*) 35 Geo. 3, c. 63, § 13.

(*c*) Ridsdale *v.* Sheddon, 4 Camp. 107.

(*d*) Ramstrom *v.* Bell, 5 M. & S. 266. Where the policy of insurance was on goods at and from A to B, and the ship being driven into C, and detained, the assured afterwards applied through their agent to the underwriters, to alter the policy by adding two new ports, as they feared there might be an enemy at B, and had ordered the captain to proceed to one of the ports proposed, instead of B. The underwriters consented to make the alteration, and the ship and cargo were lost on the passage to the substituted port. It was holden, that the policy with this alteration did not require a new stamp, under the act of 35 Geo. 3, c. 63, § 13. Weir *v.* Aberdeen, 2 B. & Ald. 320. A vessel having sailed, and put back twice, in consequence of laboring and straining, from being over loaded, an application was made to the underwriters for liberty for the ship to go into port to discharge part of her cargo, on account of being too deep in the water. A memorandum was accordingly indorsed on the policy by the underwriters, giving this liberty; and it was held that no new stamp was required

(*e*) Hubbard *v.* Jackson, 4 Taunt. 169

(*f*) Kensington *v.* Inglis, 8 East. 273.

on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. (*g*) And if the declaration of interest in a policy of insurance be altered by striking out the words "on ship," and inserting "on goods, as interest may appear," the assured not having any interest in the ship, a new stamp will not be necessary. (*h*)

A change, by consent, of destination of the vessel, made upon the policy after the risk has attached, and while the assured has a purpose of change *ex juste causa*, is held not to require a new stamp. (*i*) But an alteration of the place of destination, made without consent, would avoid the policy. (*j*) Where there is an interest to which the insurance attaches, an alteration in the policy, varying the description so as to cover a different interest, though made with the consent of all parties, makes a fresh stamp necessary. Thus, where a policy was originally effected on "ship and outfit," on a whaling voyage out and home, and, after the vessel sailed, the policy was altered, by consent of parties, to "ship and goods," it was held, that in the absence of a new stamp, the policy was void, and that the parties could not resort back to the instrument as it originally stood, and treat it as a policy on "ship and outfit." (*k*)

Whilst the matter of a policy is *in fieri*, — that is, before the instrument has commenced its function, — it may be altered in any respect without requiring to be restamped. (*l*) But it should be borne in mind, that where an alteration is made in any instrument while the matter of it is *in fieri*, as in any other case of alteration, a party who produces and relies upon the document in its altered state, must show the circumstances

(*g*) Robinson *v.* Touray, 1 M. & S. 217.

(*h*) Sawtell *v.* Loudon, 1 Marsh. 99; 5 Taunt. 359.

(*i*) Brocklebank *v.* Sugrue, 1 B. & Ad. 81. A policy duly stamped was effected on a ship at and from Liverpool to Quebec. Being detained beyond the intended time of sailing, a memorandum was indorsed on the policy, that, in consequence of the detention, the voyage was changed to one from Liverpool to St. Johns, N. B., at and from thence back to London, in consideration of an additional premium. This change of destination of the ship was held to be an alteration of the terms and conditions of the policy permitted by the act of 35 Geo. 3, ch. 63, § 13, and therefore the memorandum did not require a new stamp. Ramstrom *v.* Bell, 5 M. & S. 266, *supra*.

(*j*) Campbell *v.* Christie, 2 Stark. 64; and see Forshaw *v.* Chabert, 6 Moore, 369.

(*k*) Hill *v.* Patten, 8 East, 173; French *v.* Patton, 9 East, 351.

(*l*) Robinson *v.* Tobin, 1 Stark. 336.

under which the alteration was made. (*m*) The question, whether the alleged circumstances existed, may be one for the jury to determine; but it is for the court to say, as matter of law, whether the alterations invalidate the instrument. (*n*)

Policies of life insurance are taxed twenty-five cents where the amount insured does not exceed one thousand dollars, fifty cents where not exceeding five thousand, and one dollar where the amount is over five thousand. Deposit notes to mutual life-insurance companies, upon which stamped policies are based, are not liable to stamp duty. (*o*) Tickets of insurance issued to travellers, against fatal or non-fatal injury, are exempted from stamp duties by an amendment to the original statute. (*p*) It is held in England, that a policy of insurance on the lives of cattle should be stamped, under the clause taxing policies "made upon any property or interest whatever, from loss or damage of any kind." (*q*) Probably the clause in our statute, requiring a stamp on policies of insurance on property, against "perils of any kind," would receive the same application.

SECTION VII.

STAMPS ON CERTIFICATES, SPECIAL AND GENERAL.

Certificates of stock in any incorporated company, certificates of deposit of any sum of money, certificates of damage or otherwise, and all others issued by port wardens or marine surveyors, are liable to special stamp duties; and certificates of any other description, to a five cent stamp. (*r*) By an amendment to the statute, certificates of weight and measure, certificates of record of deeds, and of their acknowledgment or proof by attesting witnesses, are specially exempted. (*s*)

A certificate signed by a pledgor, setting forth that he had

(*m*) London & Brighton R. Co. *v.* Fairclough, 2 M. & G. 675; 3 Scott, N. R. 68.

(*n*) Bartlett *v.* Smith, 11 M. & W. 483.

(*o*) Act of March 3, 1863, § 6.

(*p*) Proviso to § 3, Act of March 3, 1863.

(*q*) Atty.-Gen. *v.* Cleobury, 4 Exch. 65.

(*r*) Act of July 1, 1862, Sched. B

(*s*) Act of March 3, 1863, § 6.

deposited certain chattels as a pledge for a sum of money borrowed, and empowering the pledgee to sell in case the money was not returned by a specified day, has been held not to require a mortgage stamp, under the English statute. (*t*) General certificates, as such, are not subject to stamp duty under the English acts.

Under our statute the question may arise, whether certifying a check by a bank officer, requires a stamp. Such an act is regarded as equivalent to the acceptance of a draft, where the officer has authority to perform it; (*u*) and, as the check would be already stamped as the law requires for a sight draft, a second stamp would seem to be unnecessary. Neither would such a certificate come fairly within the meaning of the term "certificate of deposit," so as to require a second stamp under that head.

It has been determined, by the Commissioner of Internal Revenue, that the *jurat* to an affidavit, affixed by a justice of the peace, or other officer authorized to administer oaths, is subject to stamp duty as a certificate. (*v*) And the predecessor of the present Commissioner has given it as his opinion that a stamp is required upon every certificate which has or may have a legal value in any court of law or equity. (*w*) Since the date of that decision (October, 1862), some certificates have been expressly exempted by Congress, as mentioned above. Unless the term "certificate" should be held to be applicable only to documents using the word "certify," we see not how any acknowledgment in writing, not specially exempt, as a carrier's receipt is exempted, (*x*) can escape stamp duty under this head.

(*t*) *In re* Attenborough, 11 Exch. 461.
(*u*) 2 Parsons on Notes and Bills, 74.
(*v*) Boutwell's U. S. Tax System, 386.
(*w*) Boutwell's U. S. Tax System, 333.
(*x*) Act of March 3, 1863, §§ 6, 10.

SECTION VIII.

STAMPS ON CONVEYANCE, MORTGAGE, AND OTHER DEEDS.

By the United States statute, any "deed, instrument or writing, whereby any lands, tenements, or other realty *sold*, shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the *purchaser* or *purchasers*, or any other person or persons by his, her or their direction, when the consideration or value exceeds one hundred dollars,"—is subject to an *ad valorem* stamp duty. (*y*) And by an amendment to Schedule B, fixing the maximum amount of stamp duty to be paid upon any one conveyance, it is provided, that "no conveyance, deed, mortgage or other writing, whereby any lands, tenements, realty or other property shall be sold, granted, assigned or otherwise conveyed, or shall be made as security for the payment of any sum of money, shall be required to pay a stamp duty of more than one thousand dollars, any thing to the contrary notwithstanding." (*z*)

It is obvious, from the very clear language of the statute, that the *ad valorem* stamp duty upon conveyances, applies only to estates that are *bought* and *sold;* for the word "sold" expressly qualifies the nature of the transaction, and the terms "purchaser" and "purchasers," are used in their ordinary sense, as designating the person effecting a bargain, and not in their technical legal sense, as indicating one who acquires land in any manner other than by descent or the mere act of law. And it is also evident, that no new duties upon conveyances, are imposed by the clause of the amendatory act above quoted. If the meaning of its language is not identical with the words of the original statute, the variation is only one in *appearance*, arising from the introduction of the word "mortgage" into the amendatory clause, and the consequent necessity of a different collo-

(*y*) Act of July 1, 1862, Sched. B.

(*z*) Act of March 3, 1863, § 6.

cation of the word "sold," in order to avoid the absurdity of speaking of a conveyance of "property sold," as one "made as security for the payment of any sum of money." But even if the meaning of the amendment, as applied to conveyances of real estate, should be held to be a substantial variation from the sense of the original statute, the utmost that it can be held to say, in reference to conveyances of real estate not sold, is, that no such conveyance shall be required to pay a stamp duty of more than a thousand dollars." As the original statute does not provide that conveyances of estates not sold shall pay an *ad valorem* duty, and as this amendment makes no such provisions in terms, it is quite clear that any argument which would go to prove that the amendatory clause imposes a stamp upon conveyances of real estate not sold, would lead to the absurd conclusion that such conveyances must, in all cases, bear a specific stamp of one thousand dollars.

It may be observed, also, that the English stamp acts use the words "upon the sale," and "purchaser or purchasers," just as our statute does the words "sold," and "purchaser or purchasers," in describing what kinds of conveyances of real estate are subject to *ad valorem* stamp duties; (*a*) and that English decisions are uniform, to the effect that no conveyance of real property except upon a *sale*, is liable to an *ad valorem* stamp. (*b*) By the English act, a conveyance for any other purpose than sale or mortgage, is provided for by a specific stamp duty, with an *ad valorem* addition upon the amount of equality money in certain cases, where equality, above a specified amount, is paid. (*c*) Upon the considerations above advanced, we are clearly of opinion, that the United States stamp acts impose *ad valorem* duties only upon conveyances of real property that is sold or

(*a*) 48 Geo. 3, c. 149; 55 Geo. 3, c. 184; 13 & 14 Vict. c. 97.

(*b*) Henniker *v.* Henniker, 1 E. & B. 54; decides, that an exchange of lands upon which money is paid for equality of partition, is not a sale, within the terms of the stamp act; Denn *v.* Diamond, 4 B. & C. 243, decides, that a father's deed of estates to his son, in pursuance of a family arrangement for the benefit of his children, is not liable to *ad valorem* duty as a sale. See Belcher *v.* Sikes, 6 B. & C. 134; Massy *v.* Nauney, 3 Bing. N. R. 478; 4 Scott, 458; Blandy *v.* Herbert, 9 B & C. 396; as to what will amount to a sale under the conveyance clause of the stamp act. Coates *v.* Perry, 3 B. & B. 48, decides, that a conveyance to trustees for benefit of creditors by a debtor, with a resulting trust to himself, does not require an *ad valorem* stamp, as upon a sale or mortgage, under 55 Geo. 3, c. 184.

(*c*) 55 Geo. 3, c. 184.

mortgaged, and that all other conveyances are left to be stamped under the general head of contracts or agreements. (*d*)

We notice that the Commissioner of Internal Revenue has ruled, that a sheriff's deed to a creditor, of real estate levied upon under an execution; (*e*) an executor's, administrator's, or trustee's deed to heirs; (*f*) deeds of partition between heirs or other tenants in common; and conveyances in *all cases*, whether by a "quitclaim" or a "warranty deed" (if the value of the property conveyed exceeds one hundred dollars), must be stamped with an *ad valorem* stamp, as prescribed under the head of "Conveyance." (*g*) Upon what ground these rulings are made, in view of the fact that the statute expressly uses the word "sold," we do not clearly see; for it is not every form of conveyance that even embraces the technical word "sell" in the operative clause. They are not in conformity with the law, upon any rules of construction we can see to be applicable to the subject.

A conveyance of an estate sold subject to a mortgage, which is in fact a sale of an equity of redemption, would doubtless be properly stamped for the value of the interest thereby sold and conveyed, and would not require a stamp proportioned to the whole value of the estate. This is held to be the true construction of the English statute, (*h*) unless the vendee agrees to assume the mortgage as a part of the consideration for the sale, in which case there is a special provision that the stamp duty shall cover the amount of the mortgage also. (*i*)

It is held in England, that a deed of confirmation of an inoperative deed that was duly stamped, does not require an *ad valorem* stamp, as for a sale of the property. (*j*) A deed purporting to be a conveyance of land, but inoperative as such, for want of a seal, and containing a stipulation not to disturb the

(*d*) In James *v.* Blanvelt *et al.* in Equity, recently determined in the U. S. Circuit Court for the Eastern District, Pennsylvania, *Cadwallader*, J., decided, that a double stamp duty was not incurred by the duplication of the original conveyance. In this case, the vendor had conveyed the estate to a middleman by a stamped deed, and the latter by an unstamped deed, and, for a nominal consideration, had conveyed to the vendee, in pursuance of an arrangement for this mode of transfer, made at the time of the sale. — See Legal Intelligencer, May 27, 1864.

(*e*) Boutwell's U. S. Tax System, 345

(*f*) Boutwell's U. S. Tax System, 341.

(*g*) Boutwell's U. S. Tax System, 367.

(*h*) Per *Pollock*, C. B. in Marquis of Chandos *v.* Comms. of Rev. 6 Exch 481

(*i*) 55 Geo. 3, c. 184.

(*j*) Doe *v.* Weston, 2 Q. B 249.

grantee in the enjoyment of the premises, is held to operate only as an agreement, and to require a stamp accordingly. (*k*)

Under the English statute, which provides that the stamp upon a deed shall be in proportion to the amount of the purchase or consideration-money "therein or thereupon expressed," and which imposes heavy penalties for not truly stating the amount of the consideration in the deed, it is held, that if the full consideration be not expressed in an instrument, it is not thereby rendered void, on the ground of not being properly stamped. Our statute, however, uses the terms "consideration or value," and does not limit them to what the instrument expresses as the amount. (*l*)

A stamped deed delivered to the grantee, but subsequently destroyed by consent of parties, is held not to divest the grantee of his title, which can only be done by a reconveyance properly stamped. (*m*) And a deed legally stamped, is not vitiated by a reference therein to instruments that are unstamped. (*n*)

It has been held in England, that a conveyance of lands in Australia, that was executed in England, was liable to stamp duty, though the stamp acts relate solely to Great Britain and Ireland. (*o*) We presume that any conveyance executed in the United States, for the sale of lands abroad, would be held liable to our stamp laws, if the question should come before the courts of this country; for there is no exemption in our statute, as to where the lands are situated. The terms are broad, embracing "any lands sold," and we see not how any court, State or national, could set aside the revenue laws, if the conveyance was executed and delivered within the United States.

Any mortgage, whether of real or personal property, by the statute as amended, (*p*) must be stamped with an *ad valorem*

(*k*) Rex *v.* Ridgwell, 6 B. & C. 665.

(*l*) Duck *v.* Braddyll, M'Clel. 217, 13 Price, 455; Robinson *v.* McDonald, 5 M. & S. 228. — *Cadwallader*, J. expresses the opinion that the term "value" in the statute, applies to the *estate*, and the term "consideration," to the *conveyance;* and that if the consideration given for the conveyance be greater than the value of the estate, or than the amount expressed in the deed, the stamp must be according to the amount of the consideration so given. See James *v.* Blanvelt, in Law Intel. of May 27th, 1864. In this case a deed inadequately stamped was allowed to be valid by the subsequent addition of the deficient amount of stamps.

(*m*) Souverbye *v.* Arden, 1 Johns. Ch 240; Nicholson *v.* Halsey, id. 417.

(*n*) Duck *v.* Braddyll, M'Clel. 217, 13 Price, 455.

(*o*) *In re* Wright *v.* Comms. of Rev. 11 Hurl. & G. 458.

(*p*) Act of March 3, 1863, § 6

stamp, at the rate of ten cents for every two hundred dollars, or fractional part thereof. The same amendatory act provides that no mortgage shall be required to pay a higher duty than one thousand dollars, and that one stamp only shall be required for both instruments where there is a bond or note secured by mortgage; but in such case the highest rate applicable to either instrument separately, must be adopted. It will be noticed that the amended rates for notes having over six months to run is precisely the same as the amended mortgage rates, namely ten cents for every two hundred dollars, or fraction thereof; and that the rates provided for personal bonds for a sum certain, is also identical with the mortgage rates.

A conveyance on its face absolute, with a deed of defeasance back, operating contemporaneously, is provided for by the statute, and, as a conveyance intended only as a security, is to be stamped at the mortgage rates. (*q*) The instrument of defeasance would seem to require either a bond or an agreement stamp, according to its form.

As the amended statute requires every mortgage to be stamped with an *ad valorem* duty, where no specific amount is mentioned as the sum for which the mortgage is given as security, (*r*) the proper measure of the stamp must be left discretionary with the parties. If such a mortgage be not stamped, we see not how it can be enforced. The English statute provides, that a mortgage to secure an uncertain and unlimited amount, shall be available only for such an amount as the *ad valorem* duty denoted by any stamp thereon will extend to cover; (*s*) and, in the absence of any positive enactment upon the subject, we think the courts of this country would hold that the spirit of our statute would sanction the same doctrine here.

Upon every assignment or transfer of a mortgage, a stamp is to be affixed equal to that imposed on the original instrument. (*t*) It is held in England, that an assignment of a policy of insurance as a security for a debt, with a proviso for its redemption on payment of the sum owed, is a mortgage, and

(*q*) Act of July 1, 1862, Sched. B, Mortgage.

(*r*) Act of March 3, 1863, § 6.

(*s*) 13 & 14 Vict. c. 97.

(*t*) Act of March 3, 1863, § 6.

requires an *ad valorem* stamp. (u) The same rule would doubtless govern under our statute; though a simple assignment of a policy is only subject to the specific duty imposed upon the original instrument. (v)

A renewal of a chattel mortgage by notice entered upon the record, as authorized by the laws of some of the States, does not come within the provisions of the stamp act, and the Commissioner of Internal Revenue has ruled, that such a renewal does not render the use of a stamp necessary. (w) He has also decided, that a release of a mortgage by which it is discharged, and a quitclaim deed from the mortgagee to the mortgagor, operating simply to discharge the mortgage, are exempt from stamp duty. (x)

A mortgage deed to secure distinct sums of money to different persons, should be stamped with the *ad valorem* duty chargeable on each sum, and not with a duty computed upon the aggregate sum. This is distinctly provided for by the English statute; (y) but it would seem to be a reasonable intendment of our law, in the absence of any special provision; for such an instrument is, in fact, several mortgages. It is held, however, that where there are several mortgagees, having, in fact, separate interests, if the deed do not show that it is given as a security for the payment of separate and distinct sums, an *ad valorem* stamp on the gross amount will be sufficient. (z)

One stamp only being used for both instruments, where there is a note and mortgage, it would be well, in executing such instruments, to insert a statement upon the one not stamped, that the other is duly stamped, in order that the former may appear conformable to law upon the face of it, and the absence of a stamp explained. It might be well also, to insert in the witness clause of deeds and other instruments of a solemn nature, in addition to the usual words attesting the signing, sealing, and delivery, words of attestation as to the stamping. Available evidence of the time of stamping would thus be secured, and the possible inconvenience resulting from a subsequent loss of the stamp, be avoided.

(u) Caldwell *v.* Dawson, 5 Exch. 1; Warren *v.* Howe, 2 B. & C. 281.

(v) Act of March 3, 1863, § 6.

(w) Boutwell's U. S. Tax System, 343.

(x) Boutwell's U. S. Tax System, 347.

(y) 55 Geo. 3, c. 184.

(z) Reed *v.* Wilmot, 7 Bing. 577.

Bonds for indemnifying sureties for the payment of money, and official bonds, are charged with a stamp duty of fifty cents. (*a*) Personal bonds for the payment of money, or as security for the payment of *any definite and certain* sum of money, are charged with an *ad valorem* duty of ten cents upon every two hundred dollars, or fractional part thereof. (*b*) Bonds required in legal proceedings are exempt, and bonds of any other description than those above enumerated, are liable to a twenty-five cent stamp. (*c*) A bond as security for the payment of an indefinite and uncertain sum, or for an unlimited amount, under our statute, is chargeable under the head of "bond of any other description," with a twenty-five cent stamp. Such a bond in England, was formerly charged with a specific duty, (*d*) as under our law; but is now chargeable with an *ad valorem* duty on the amount of the penalty expressed therein; and if no penalty be expressed, the bond is available only for the amount which the *ad valorem* stamp upon it will extend to cover. (*e*)

In estimating the stamp duty on a personal bond for the payment of money, or as security for any definite or certain sum, the interest, whether by-gone or subsequent, is not to be considered; that being in the nature of damage for the non-payment of the sum advanced, and not falling within the meaning of a "definite and certain sum," secured by the bond. (*f*) Where several bondsmen bind themselves to do the same thing, in one bond, only one stamp is required. (*g*)

Leases and agreements for the hire of real estate, are charged with a specific stamp duty of fifty cents, if the term is three years or less, and one dollar, if over three years. (*h*) An assignment of a lease must be stamped the same as the original instrument. (*i*) The terms of the statute, being for the *hire*, *use*, or *rent* of the premises to which the lease refers, seem to provide expressly, that both the tenant's part of the instrument and the landlord's, must be stamped. It is held by the Commissioner of Internal Revenue, that a lease which operates as

(*a*) Act of July 1, 1862, Sched. B.
(*b*) Act of March 3, 1863, § 6.
(*c*) Act of July 1, 1862, Sched. B.
(*d*) 55 Geo. 3, c. 184.
(*e*) 13 & 14 Vict. c. 97.
(*f*) Barker *v.* Smart, 7 M. & W. 590.
(*g*) Bowen *v.* Ashley, 1 B. & P. N. R. 274.
(*h*) Act of July 1, 1862, Sched. B.
(*i*) Act of March 3, 1863, § 6.

a deed of conveyance, should be stamped as a conveyance, with an *ad valorem* duty upon the total value of the property; also that the assignment of such a lease should be stamped in the same manner. (*j*)

A surety's signing a lease as security for the rent, is held not to make an additional stamp necessary, as for a bond or an agreement. His covenant to pay rent is regarded as partly the consideration for granting the lease. (*k*) And a lease containing a privilege of purchasing the demised premises, does not require an additional stamp as an agreement. (*l*) But a privilege for the lessee to purchase other premises, will render the lease also liable to an agreement stamp. (*m*)

A contract for rooms and board in a hotel or boarding-house, is held not to constitute a lease, or to create the relation of landlord and tenant. (*n*)

SECTION IX.

STAMPS ON POWERS OF ATTORNEY AND LEGAL DOCUMENTS.

Powers of attorney for the sale or transfer of any stock, bonds, or scrip, or collection of interest or dividends thereon; powers of attorney or proxies for voting at elections of officers in business corporations; powers of attorney to collect rents, to sell and convey, or to rent or lease real estate; and powers of attorney to perform any and all other acts not before specified, are charged with appropriate specific duties. (*o*) Powers of attorney and other papers relating to applications for bounties, arrearages of pay, pensions, or to the receipt thereof, are specially exempted from stamp duty. (*p*)

The question may arise under the statute, whether a power of attorney "to perform any and all other acts not before specified," which requires a dollar stamp, would also be subject to

(*j*) Boutwell's U. S. Tax System, 367, 369.

(*k*) Price *v.* Thomas, 2 B. & Ad. 218.

(*l*) Worthington *v.* Warrington, 5 C. B. 356.

(*m*) Lovelock *v.* Franklyn, 8 Q. B. 371.

(*n*) Wilson *v.* Martin, 1 Denio, 602.

(*o*) Act of July 1, 1862, Sched. B; and Act of March 3, 1863, § 6.

(*p*) Act of March 3, 1863, § 6.

an additional stamp, in consequence of including the performance of any of the acts charged with specific duties. We presume, that in such a case, the general stamp would be held sufficient to cover all the powers embraced in the instrument; for the effect of the phrase quoted may be regarded as cumulative, rather than alternative and exclusive. And though the power of attorney or proxy, for which the ten cent stamp is prescribed by the statute, is specifically described as a proxy for voting at any election of officers of an incorporated company, yet we presume the same stamp would be sufficient to cover a stockholder's proxy for voting upon any other question before the company.

The Commissioner of Internal Revenue has decided, that a note payable, containing also a power to sell or transfer stock, requires an additional stamp as a power of attorney; (*q*) but that a mortgage does not require a second stamp in consequence of containing also a power of attorney or power of sale. (*r*)

A writ or other original process, by which any suit is commenced in any court of record, either of law or equity, is subject to a specific stamp of fifty cents. A writ, summons, or other process issued by a justice of the peace, is specially exempted from stamp duty; as also all process, civil or criminal, in suits commenced by the general or any State government. (*s*)

The statute exempts from duty, a warrant of attorney accompanying a bond or note duly stamped. (*t*)

Under the provisions applicable to legal documents, the Commissioner of Internal Revenue has given an opinion, that an appeal or other instrument, by which a suit is transferred from a justice of the peace to a court of record, is subject to stamp duty as an original process; also that a writ of *scire facias*, in civil or criminal cases, is an original process, and must be stamped; but that writs of error, certiorari, habeas corpus, and alias and pluries writs, and counterpart, are exempt. (*u*)

It has been decided in England, that a writ may be altered as to the return day, before it is returnable, without a fresh

(*q*) Boutwell's U. S. Tax System, 354.
(*r*) Boutwell's U. S. Tax System, 339.
(*s*) Act of July 1st, 1862, Sched. B.
(*t*) Act of March 3d, 1863, § 6.
(*u*) Boutwell's U. S. Tax System, 353.

stamp, provided no term intervenes between the teste and the day on which it is ultimately made returnable.(*v*)

SECTION X.

STAMPS ON PROBATE AND ADMINISTRATION.

Stamp duties are imposed upon probate of wills and letters of administration, in proportion to the amount which is sworn to, or declared as the value of the estate. And it is held, by the Commissioner of Internal Revenue, that the value of all the property of the deceased, real or personal, that is within the jurisdiction of the probate court, is the true measure of the stamp for that jurisdiction. If there be other property coming within another jurisdiction, that portion of the estate is to pay a stamp duty only in the jurisdiction under which it falls. (*w*) And it is held in England, that property not locally within the jurisdiction of the court granting probate or administration, is not the subject of stamp duty within such jurisdiction. (*x*)

The value of the property with reference to the stamp duty, is to be taken as of the time when the letters of administration or probate are granted, and not of the decease. (*y*) If the pro-

(*v*) Durden *v.* Hammond, 1 B. & C. 111.

(*w*) Boutwell's U. S. Tax System, 341, 347.

(*x*) Atty.-Gen. *v.* Dimond, 1 Cromp. & J. 356; 1 Tyrw. 243. The Attorney-General laid an information for probate duty, in respect to the proceeds of a certain sum in French *rentes*, the property of the testator, and a verdict was taken for the crown, subject to the opinion of the court, as to whether the property thus situated was liable to duty. The *rentes* were sold by a French house under a power of attorney from the testator's executor, and the proceeds were transmitted to England by bills, and invested in consols. The court held, that the property in question was assets, but not being within the jurisdiction of the Ecclesiastical Court at the death of the testator, the probate was not granted in respect to them, and the verdict should be for the defendant. Atty.-Gen. *v.* Hope, 1 C., M. & R. 530. In this case the testator died domiciled in England, leaving property in North America, as well as in England, and on the seas. Probate duty was paid only upon the property in England and on the seas; and upon the question whether the American property was subject to stamp duty, the House of Lords affirmed the unanimous decision of the Court of Exchequer, that it was not liable. But where the assets consist of foreign securities, which are salable and transferable by delivery merely, and no act of the holder, to be done out of the kingdom, is necessary in order to make a valid transfer, it is held, as in The Atty.-Gen. *v.* Bouwens, 4 M. & W. 191, that they are subject to probate duty as a part of the testator's effects, in the nature of valuable chattels.

(*y*) Doe *v.* Evans, 10 A. & E. 476.

bate or administration stamp is too small, by reason of the property being undervalued, the party causing the document to issue, will subject himself to the penalty provided by the statute for not duly stamping, and the instrument in that condition will be invalid and of no effect. (*z*) If an administrator sues in trover on his own possession, for a greater value than is covered by the *ad valorem* stamp on his letters of administration, he shows his adminstration to be void, and cannot recover, although the claim for which he sues be doubtful. (*a*) Where an executrix sued to recover a large, unliquidated sum due to her testatrix, but the stamp on the probate did not cover the amount claimed, it was held, that the plaintiff could not obtain a decree even for an account and inquiries, until the probate had been properly stamped; and the action stood over for that purpose. (*b*) From these instances it will be seen, that an insufficient probate stamp is fatal, even in England, where post-stamping, under certain restrictions, is allowed; and under our statute it must be held, that an insufficient stamp would render the probate or administration entirely nugatory, and necessitate the commencement of probate proceedings *de novo*.

While it is held, that desperate and doubtful debts may be ex-excluded, in estimating the amount of the effects of the deceased, (*c*) yet a claim for damages which survives must be included, or the stamp may not be sufficient to sustain the authority of the executor or administrator to sue. (*d*) And it may

(*z*) Act of July 1, 1862, § 95.

(*a*) Hunt *v.* Stevens, 3 Taunt. 113.

(*b*) Howard *v.* Prince, 10 Beav. 312; Christian *v.* Devereaux, 12 Sim. 264; Roberts *v.* Madocks, 16 Sim. 55.

(*c*) Moses *v.* Crafter, 4 C. & P. 524. In this case the probate was shown to be stamped for property under the value of £200; but it would have exceeded £2,000, if debts due from bankrupts and doubtful debtors had been included. The stamp was held to be sufficient, Lord *Tenterden* remarking, that desperate and doubtful debts need not be included; and that an executor had a right to exercise his judgment, fairly and *bona fide*, whether a debt was doubtful or bad.

(*d*) Carr *v.* Roberts, 2 B. & Ad. 905. The plaintiff sued as administratrix, for the arrears of an annuity payable by the defendant, to whom the intestate had conveyed all his property by deed, in consideration of an annuity for himself, a covenant to pay his debts, and to pay the annuity in question, which had previously been granted by him to a third party. The administratrix sued upon the covenant, for the benefit of the third party, and the amount of the arrearage sued for was £500; all of which had accumulated in the lifetime of the testator. Her letters of administration were unstamped; the effects of the intestate having been sworn as under £20. The want of stamp was objected to, on the ground that the sum to be recovered was part of the intestate's property; and the court held, that the arrears claimed were subject to stamp duty, and could not be regarded as trust property within the exemption of the statute.

be remarked, generally, that while the representative of the deceased should exercise his judgment fairly and *bona fide*, in returning the value of the estate, it is altogether safer to run the risk of estimating the property too high, instead of too low; for, in the former case, the statute has provided effective means for the recovery of any amount of stamp duty which may be shown to have been paid in excess of what the law requires. (*e*)

The question whether the amount of stamp duty on probate or letters of administration, is evidence of the amount of the assets, as against the executor or administrator, is one upon which there is some doubt; but the weight of authority is against its so being considered. (*f*)

In addition to the stamp duties imposed upon probate of wills and letters of administration, the excise law imposes a tax upon all legacies and distributive shares arising from personal property which exceeds in the whole amount one thousand dollars, except those received by a husband or wife from the estate of the deceased wife or husband. This tax varies from three quarters of one per cent. on the amount of the legacy or distributive share, to five per cent., according to the degree of consanguinity of the recipient, to the person who died possessed. The tax is made a lien upon the property of the deceased, and penal measures are authorized to compel its payment by the executor or administrator of the deceased. (*g*)

SECTION XI.

OF THE PENALTIES OF THE STATUTE.

The penal provisions of the stamp act are of two classes, — one having reference to the fraudulent intention with which the prohibited act is committed, and the other having no reference to intent.

(*e*) Act of July 1, 1862, § 102; Act of March 3, 1863, § 31.

(*f*) Curtis *v.* Hunt, 1 Carr. & P. 180; Stearn *v.* Mills, 4 B. & Ad. 657; Mann *v.* Lang, 3 A. & E. 699; 5 Nev. & M. 202.

(*g*) Act of July 1, 1862, §§ 111, 112. Act of March 3, 1863, § 1.

Penalties, without reference to fraudulent intent, are imposed for not using a proper stamp upon instruments; (*h*) for paying or offering in payment, negotiating, receiving, or taking in payment, paper drawn abroad, but payable in the United States, without first stamping; (*i*) for receiving or transmitting telegraph messages not stamped; (*j*) for selling unstamped lottery-tickets; (*k*) for making time contracts concerning the loan or sale of specie, not in writing and duly stamped; (*l*) for neglecting to make returns of legacies, and distributive shares of personal property, for taxation; (*m*) for refusing information as to such legacies and shares; (*n*) for not stamping articles under schedule C, whether of foreign or home manufacture; (*o*) for having in possession for sale, unstamped articles under schedule C; (*p*) and for neglect, by manufacturers of such articles, to make periodical returns as to the stamping of the same. (*q*)

Penalties, having reference to the fraudulent intent, are imposed for the fraudulent use of revenue stamps without cancelling, as required by the law; (*r*) for issuing, accepting, or paying unstamped negotiable paper, with design to evade the payment of any stamp duty; (*s*) for using stamps that have once been used in payment of duty; (*t*) for not stamping articles enumerated in schedule C, with design to evade the duty; for keeping for sale such articles unstamped, with design to avoid the payment of duty; (*u*) and for making false declarations in periodical returns concerning the manufacture of such articles. (*v*)

The statute requires the collectors of internal revenue for the several districts, or their deputies, to sue for and recover all penalties and forfeitures that may be incurred, by any proper form of action or proceeding, before any circuit or district court

(*h*) Act of July 1, 1862, § 95.

(*i*) Act of July 1, 1862, § 101.

(*j*) Act of July 1, 1862, § 104.

(*k*) Act of March 3, 1863, § 2.

(*l*) Act of March 3, 1863, §§ 4, 5.

(*m*) Act of July 1, 1862, § 112.

(*n*) Act of July 1, 1862, § 112.

(*o*) Act of July 1, 1862, § 107; Act of March 3, 1863, § 27.

(*p*) Act of July 1, 1862, § 114; Act of March 3, 1863, § 27.

(*q*) Act of July 1, 1862, § 110; Act of March 3, 1863, § 27.

(*r*) Act of July 1, 1862, § 99; Act of March 3, 1863, § 27.

(*s*) Act of July 1, 1862, § 100.

(*t*) Act of July 1, 1862, §§ 98, 108; Act of March 3, 1863, § 27.

(*u*) Act of July 1, 1862, § 109; Act of March 3, 1863, § 27.

(*v*) Act of July 1, 1862, § 110; Act of March 3, 1863, § 27.

of the United States for the district in which the penalty or forfeiture is incurred, or before any other court of competent jurisdiction,—one moiety thereof to the use of the deputy or collector, and the other to the use of the United States. In the absence of any provision in the statute for the form of action to be adopted in suing for penalties and forfeitures, it has been held, that either debt or information will lie. (*w*)

The statute declares it to be a felony to forge or counterfeit any of the dies or stamps to be provided, made, or used under the act, with intent to defraud the United States; or knowingly to use any stamp or die which shall have been provided, made, or used under the act, with intent to defraud the United States; or to cut, tear, or get off from any vellum, parchment, or paper, the impression of any stamp or die which shall have been provided, made, or used in pursuance of the act; and for the commission of any of these acts a punishment of forfeiture, fine, and imprisonment is decreed. (*x*) The fraudulent procuring or use of proprietary stamps, and acts of forging, counterfeiting, or dealing therein, are declared a misdemeanor, punishable in the same manner as the felonious acts relating to government stamps. (*y*)

It is held, that a stamp is not necessary upon a forged instrument in order to constitute the crime of forgery, as the stamp acts are merely revenue laws, and do not purport to alter the crime of forgery. (*z*) And in an indictment for forging a stamp, it is not necessary to set out the impression or inscription upon it, or to specify the amount of duty denoted; it being held sufficient to describe it as a stamp provided and used in pursuance of a certain statute. (*a*)

(*w*) Adams *v.* Woods, 2 Cranch, 336. Actions for taxes and penalties, under the Internal Revenue Law of the United States, may be instituted before justices of the peace and the State courts of Massachusetts, by chap. 124 of acts of the Mass. Legislature, 1863, approved April 4, 1863.

(*x*) Act of July 1, 1862, § 98.

(*y*) Act of July 1, 1862, § 99.

(*z*) Rex *v.* Hawkeswood, 1 Leach. C. C. 257; 2 East, 955; Rex *v.* Reculist, 2 Leach, C. C. 703, 2 East, 956.

(*a*) Rex *v.* Collicutt, 1 Russ. & Ry. 212; 4 Taunt. 300.

SECTION XII.

OF PLEADING, PRACTICE, AND EVIDENCE AS TO STAMPS.

A party may be precluded by his pleadings, or by his acts, from objecting to the absence or sufficiency of a stamp, as by pleading the general issue in a suit brought by an administrator, whose letters are not duly stamped; (*b*) by paying money into court generally; (*c*) or by paying money on account of two bills, both overdue, which is appropriated by the holder to one not properly stamped. (*d*) But want of stamp need not be specially pleaded to a bill; it may be shown under the plea of non-acceptance. (*e*) A plea that a bill was not *duly* stamped, was held bad on demurrer, as the bill was admissible in evidence, although impressed with a stamp denoting a higher duty than was required. (*f*) Defence of reissue after payment should be specially pleaded. (*g*)

In an action of assumpsit by an administrator, upon a promise to his intestate, with a profert of the letters of administration, if the defendant would put in issue the validity of the stamp, he must plead *ne unques* administrator. (*h*)

As a question of practice, it is important to know when an objection on account of the stamp should be made. And the principle, as collected from the English cases, appears to be, that the objection must be taken at the earliest possible moment. (*i*) Starkie, in his work on evidence, says that it must be taken at the trial, before the instrument is read. (*j*) But, if the defect or irregularity be such as can be shown only by evi-

(*b*) Thynne *v.* Protheroe, 2 M. & S. 553.
(*c*) Israel *v.* Benjamin, 3 Camp. 40.
(*d*) Biggs *v.* Dwight, 1 Man. & R. 308.
(*e*) Dawson *v.* Macdonald, 2 M. & W. 26; Field *v.* Wood, 8 C. & P. 52; 7 A. & E. 114.
(*f*) Haward *v.* Smith, 4 Bing. N. C. 684; 6 Scott, 438.
(*g*) Lazarus *v.* Cowie, 3 A. & E. N. S 459.
(*h*) Thynne *v.* Protheroe, 2 M. & S 553.
(*i*) Per *Byles*, J., in Robinson *v.* Ld. Vernon, 7 C. B. N. S. 231.
(*j*) Starkie on Evid. 1377.

dence *ab extra*, the instrument may be read when offered, subject to the objection, which the objector may afterwards prove as a part of his case. (*k*) Under the United States statute, instruments that are stamped free, by the Commissioner of Internal Revenue, cannot be objected to for want of stamp when offered in court. (*l*)

It is incumbent on the party objecting to the sufficiency of the stamp, to be prepared to prove his objection, and not on the party relying on the instrument, to prove that the stamp is proper. (*m*) But where the instrument is *prima facie* liable to stamp duty, it lies on the party contending for an exemption, to prove that it is exempt. (*n*)

Where there is a stamped agreement, and an unstamped one of the same nature, indorsed on the back of it, there may be a recovery on the first, if there is a separate count for it. (*o*)

If the plaintiff obtains judgment upon demurrer, he is not obliged to produce the instrument sued on, to see if it is properly stamped. (*p*) And where, at the trial, a party having notice to produce an instrument, does not produce it, the court will presume it to be properly stamped, until the contrary appears; but if the contrary is proved, secondary evidence of the document cannot be received. (*q*) The same doctrine applies to an instrument proved to be lost. (*r*)

An acceptor of an unstamped bill is not prevented from objecting to the want of stamp when sued upon it, on the ground of knowledge of the defect at the time he accepted, as the doctrine of estoppel does not apply where the revenue is concerned. (*s*)

Where the question of validity of the stamp arises, in consequence of alterations apparent upon the instrument, it is for the party relying upon the instrument to account for the alterations, and upon the proof offered, it is a question of law for the court to decide, whether the instrument is properly stamped. (*t*)

(*k*) Field *v.* Woods, 8 C. & P. 52; 7 A. & E. 114.

(*l*) Act of July 1, 1862, § 103.

(*m*) Waddington *v.* Francis, 5 Esp. 182; Ld. Dudley *v.* Robins, 3 C. & P. 26.

(*n*) Chanter *v.* Dickinson, 5 M. & G. 253.

(*o*) Robson *v.* Hall. Peake, 127.

(*p*) Lane *v.* Mullins, 1 Gale & D. 712.

(*q*) Crisp *v.* Anderson, 1 Stark. 35; Crowther *v.* Solomons, 6 C. B. 758.

(*r*) Pooley *v.* Goodwin, 4 A. & E. 94.

(*s*) Steadman *v.* Duhamel, 1 C. B. 888; Bennison *v.* Jewison, 12 Jur. 485.

(*t*) Knight *v.* Clements, 8 A. & E. 215; Bartlett *v.* Smith, 11 M. & W. 483. In

Though an unstamped instrument is not admissible in evidence of any agreement between the parties, the court may look at it to see how far it affects the reception of other evidence. Thus, if an unstamped contract relate to an expired hiring and service, the court will look at the instrument to see when it ceased to operate, as a means of determining the admissibility of parol evidence to prove a subsequent hiring and service. (*u*) But where an action is brought for *extra* work done under a contract, if the instrument be unstamped, the court cannot look at it to determine whether the work done is or is not *extra* the agreement. (*v*) If, however, the plaintiff declare upon two written agreements, one of which is unstamped, with some counts on both agreements and some on the stamped agreement alone, it is held, that the court may look at the unstamped instrument to see if it alters the other. (*w*)

Where an action is brought upon a promissory note which is unstamped, and the plaintiff in his bill of particulars demands money on a note only, he cannot resort to the money counts for the court will not permit evidence of the consideration to be introduced, where the defendant is not apprised of such a purpose by the bill of particulars. (*x*)

It is not usual for judges themselves to take objection to the want of stamp on an instrument; but if the fact be brought before them in any mode, they cannot pass it without objecting. Thus, where an officer of the court objected to draw up a rule

an action of assumpsit by the indorsee against the drawer of a bill, the plaintiff proposed, at the trial, to read the bill, which was stamped as a foreign bill. The defendant's counsel objected, on the ground that, though purporting to be drawn in Dublin, the bill was, in fact, drawn in London. The court, however, received the bill, it not being objectionable on the face of it. For the defence, evidence was adduced that at the date of the bill the drawer was in London; and the question was left to the jury to say whether the bill was drawn in London or Dublin. The jury found a verdict for the plaintiff, and the case came before the Exchequer upon the question whether the evidence should have been received before the bill was admitted to be read. The court held, that the question as to the validity of the objection taken to the document, was one entirely for the judge; that the evidence on this point was to satisfy his own mind; and when the objection was stated in this case, he should have gone into the question, and not have permitted the jury to give any opinion upon the point, whether or not it was admissible.

(*u*) Rex *v.* Pendleton, 15 East, 449.

(*v*) Vincent *v.* Cole, 1 Mood. & M. 257, 3 C. & P. 481; Baxton *v.* Cornish, 12 M. & W. 426.

(*w*) Reed *v.* Deer, 7 B. & C. 261. In this case, the court determined that, as the stamped agreement was varied by the other, the plaintiff could not recover on the counts setting out the first alone.

(*x*) Wade *v.* Beasley, 4 Esp. 7.

upon an unstamped instrument, the court held, that they were bound to consider the question as thus presented to their notice. (*y*)

Where, by the English statute, post-stamping is allowed, the court will enable parties in certain cases to have an unstamped instrument produced for the purpose of being stamped. But the party claiming this privilege must be directly interested in the instrument as a party, or by its being in the hands of the custodian as a trust for his benefit. (*z*) As post-stamping, except in case of instruments made abroad, is only allowed by the United States statute where the document is issued prior to the first day of June, 1863, (*a*) the English rule can have little or no application in our courts. It would seem, though, that the words of our statute, as to post-stamping instruments, issued prior to that date, are sufficiently broad to allow any party, whether a stranger to the instrument or not, to make it available by having it stamped in court. (*b*) A practice also prevails in the English courts, of granting an order for the production of an instrument sued upon, for copy or inspection, upon condition that the defendant shall not object to the stamp at the trial; (*c*) but under our statute such a condition would be entirely inadmissible. A ruling by the court at *nisi prius*, that an objection to the sufficiency of the stamp, is taken too late, is final, and the court in banc will not afterwards enter into the circumstances which transpired at the trial. (*d*) But an objection taken at the trial need not embrace all the clauses of the stamp act upon which it may be supported, in order to entitle the party objecting to take advantage of a different clause at the hearing in banc, from that relied upon at the trial. (*e*) If an objection to the stamp is to be relied on in discussing a motion to set aside an instrument, it must be stated to the court when the motion for the rule *nisi* is made, otherwise the objection will not be entertained. (*f*)

(*y*) Hill *v.* Slocombe, 9 Dowl. 339.

(*z*) Cook *v.* Stocks, 1 Tidd's Prac. 487; Blakeley *v.* Porter, 1 Taunt. 386; Blogg *v.* Kent, 6 Bing. 614.

(*a*) Act of March 3, 1863, § 16.

(*b*) Act of March 3, 1863, § 16.

(*c*) Price *v.* Boultby, 1 C. & P. 466.

(*d*) Foss *v.* Wagner, 7 A. & E. 116, n.

(*e*) Doe *v.* Snaith, 1 M. & S. 230, 8 Bing. 146.

(*f*) Liddell *v.* Johnstone, 2 Tidd's Prac. 844.

The subject of evidence is one of the most important that we have to deal with, in reference to the stamp law; and though the term *evidence* is only used incidentally in the statute, in connection with the validity of instruments stamped free of duty by the Commissioner, (*g*) and of instruments issued prior to June 1, 1863; (*h*) yet there can be no question that the statute operates to prevent all instruments that are not sufficiently stamped from being used in evidence for any purpose in furtherance of the object which they purport to serve.

An instrument must be stamped according to the manner in which it operates at the time of execution; (*i*) and if not duly stamped, it cannot, in general, be received in evidence for any purpose for which, if stamped, it would operate. If a document, which is unstamped, but requires a stamp, is offered in evidence, and if *stamped* would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit stamped, it may, though unstamped, be received in evidence. (*j*) But, for collateral purposes, which do not assume the instrument to be valid or operative in favor of the party producing it, an unstamped instrument may be received in evidence. (*k*) Thus, an unstamped bill of exchange is admitted in evidence upon an indictment for forgery; (*l*) an unstamped policy, in an action for penalties for insuring tickets in an illegal lottery; (*m*) an unstamped promissory note, in an action of debt for bribery at an election; (*n*) an unstamped agreement, to prove usury; (*o*) an unstamped agreement, in an action to recover back a wager, on the ground of fraud; (*p*) an unstamped note, to prove fraud in the holder of it; (*q*) an unstamped bill of exchange, to rebut evidence of payment by bill; (*r*) an unstamped receipt, for the purpose of showing an agreed statement of accounts set forth therein; (*s*) an un-

(*g*) Act of July 1, 1862, § 103.

(*h*) Act of March 3, 1863, § 16.

(*i*) Weddall *v.* Capes, 1 M. & W. 50.

(*j*) Matheson *v.* Ross, 2 H. L. Cas. 286.

(*k*) 3 Stark. Ev. 1058.

(*l*) Rex *v.* Hawkeswood, 1 T. R. 450, 1 Leach, Cr. Ca. 257.

(*m*) Holland *v.* Duffin, Peake, 58.

(*n*) Dover *v.* Maestair, 5 Esp. 92.

(*o*) Nash *v.* Dunscombe, 1 Moo. & R. 104.

(*p*) Holmes *v.* Sixsmith, 7 Exch. 802.

(*q*) Gregory *v.* Fraser, 3 Camp. 454.

(*r*) Smart *v.* Nokes, 7 Scott, N. R. 786

(*s*) Matheson *v.* Ross, 2 H. L Cas 286. In an action for work and labor, there was tendered in evidence a paper

stamped check, to prove the receipt of money by means of it; (t) an unstamped agreement to dissolve a partnership, as evidence of the admission of the partnership; (u) and an unstamped receipted bill of parcels, to show to whom the goods were sold. (v)

Where, however, the validity of the instrument is of the essence of the offence for which an indictment is found, it is held, that the want of a stamp will prevent its use as evidence. Thus, upon the trial of an indictment against the accused for feloniously burning a house, with intent to defraud the insurers, an unstamped memorandum, indorsed upon the policy of insurance, was refused as evidence. (w) And it was held not to be a felony for a person employed in the post office, to purloin an unstamped check from a letter, the check being of no value without a stamp. But the same check was admitted in evidence upon a subsequent indictment for stealing the letter in which it was contained. (x) Upon an indictment against a clerk, for embezzling his employer's money, a receipt given by the prisoner to the debtor of the master who paid him the money, was rejected for want of a stamp. Here the instrument was offered for the very purpose for which the stamp law makes it unavailable; namely, to prove the receipt and payment of the money. (y)

The stamp laws do not affect the rules of evidence, and therefore, if an instrument be not essential to the plaintiff's case, although it may be the foundation of his claim, or of the proceedings to establish it, the court will not compel its production, to ascertain whether it be stamped or not. (z) Nor will the

containing a statement of accounts, which declared a balance of £68 9s. 4d., and at the end was an acknowledgment of the payment of that sum. This paper was offered in evidence by the defendant, not for the purpose of proving that the sum above mentioned had been paid, for that was not in contest between the parties, but in order to show what, at a particular time, the state of the accounts had been admitted to be. Although the document was inadmissible as a receipt, for want of stamp, it was held admissible as evidence of the state of the accounts. In this case the subject of admission of unstamped documents for collateral purposes, was very fully and ably examined.

(t) Blair v. Bromley, 11 Jur. 617, 5 Hare, 542, 2 Philips, 354.

(u) Wheldon v. Matthews, 2 Chit. 399.

(v) Millen v. Dent, 10 Q. B. 846. Here an unstamped bill of parcels was admitted in evidence to prove that the goods were sold to a third person, and not to the defendant. Hawkins v. Warre, 3 B. & C. 690.

(w) Rex v. Gilson, 1 Taunt. 95.

(x) Rex v. Pooley, 3 B. & P. 311, Russ. & R. 31; Rex v. Tooley, 1 East, P. C. addenda, 17.

(y) Rex v. Hall, 3 Stark. 67.

(z) Per Livingston, J. in Ludlow v. Van Rensselaer, 1 Johns. 94.

court compel a party to exhibit evidence to which the opposite party might otherwise be entitled, if by so doing the party so exhibiting will be obliged to lay himself open to prosecution for penalties under the stamp act. (*a*)

An instrument capable of two distinct operations, or which may be used for two distinct purposes, one of which does, and the other does not require a stamp, may be read for the latter purpose alone, without a stamp. (*b*) If, however, the document bears a stamp which would be sufficient for either purpose standing alone, and each requires a separate stamp, the instrument cannot be read as to either; for there is no means of appropriating the stamp to either. (*c*) And where the purposes for which an instrument may be used, are not distinct, but one is subordinate to the other, though but one of the purposes requires a stamp, yet the unstamped instrument can be read for neither. (*d*) Where an instrument, originally valid and duly stamped, is subsequently rendered void or inadmissible as a continuing obligation, by reason of alterations made after the stamping, it is held, that it may be read in evidence for any purpose consistent with the conclusion that it is no longer binding by way of covenant or obligation; for the purpose, for instance, of proving that an estate passed, (*e*) or to prove any collateral circumstances. (*f*)

If a contract be in writing and does not bear a proper agreement stamp, neither the contract nor any of its terms can be

(*a*) Whittaker *v.* Izod, 2 Taunt. 115; U. S. *v.* Saline Bank of Virginia, 1 Pet. 104. In giving the opinion of the court, *Marshall*, C. J. says: "This is a bill in equity, for discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statutes of Virginia. The court below decided in favor of the validity of the plea, and dismissed the bill. It is apparent, that in every step of the suit, the facts required to be discovered in support of the suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it.

(*b*) Wheldon *v.* Matthews, 2 Chit. 399; Heron *v.* Granger, 5 Esp. 269.

(*c*) Lovelock *v.* Franklyn, 8 Q. B. 371; Wharton *v.* Wharton, 7 Q. B. 474.

(*d*) Doe *v.* Stagg, 5 Bing. N. C. 564; 7 Scott, 690. In this case, the unstamped instrument signed by executors, purported to be both a surrender, for which purpose a stamp was necessary, and a disclaimer for which none was required. It was offered in evidence as a disclaimer, but a it was a deed of executors relating to property of their testator, it could not operate as a disclaimer, and the court refused to receive it in evidence.

(*e*) Doe *v.* Hirst, 3 Stark. 60. In this case the distinction is recognized, that where the thing lies in livery, a void deed may be read to show that an estate passed, but not where it lies in grant.

(*f*) Sutton *v.* Toomer, 7 B. & C. 416; Hutchins *v.* Scott, 2 M. & W. 809.

admitted in evidence; and even if shown to be lost, (*g*) or wrongfully destroyed by the opposite party, before it was stamped, no parol evidence of its contents can be given. (*h*) Nor can an unstamped instrument be read, though the party calling for its production is no party to the instrument, and could not be aware of the objection beforehand. (*i*) The production of the instrument upon notice, gives neither party a right to insist upon its being read in evidence, if found to be unstamped. (*j*)

An unstamped contract which is referred to in a stamped contract, for fixing the terms of the latter, will not be received in evidence. (*k*) Nor in such case will general evidence as to the terms be received in lieu of the unstamped contract; for the written evidence is of a higher nature. (*l*) And though the unstamped agreement is *functus officio* at the time it is offered in evidence, it cannot be received. (*m*) As a general proposition, an unstamped instrument is inadmissible when tendered to give legal effect to a document. (*n*)

Where several parts of an instrument are executed, each part is not only an original, operative instrument, but also a copy of the other. If one of the parts is offered in evidence as an original instrument, it must be properly stamped; but if it is offered merely as a copy of another part which was duly stamped, and as secondary evidence, the foundation for admitting secondary evidence having been laid, by proof that the stamped part has been lost, or by refusal of the opposite party to produce it upon notice, it may be read without a stamp. (*o*) The English

(*g*) Rex *v.* Castle Morton, 3 B. & Ald. 588.

(*h*) Rippiner *v.* Wright, 2 B. & Ald. 478.

(*i*) Doe *v.* Hore, 2 Esp. 724.

(*j*) Doe *v.* Hore, 2 Esp. 724.

(*k*) Alcock *v.* Delay, 4 Ellis & B. 660.

(*l*) Brewer *v.* Palmer, 3 Esp. 213; Ramsbottom *v.* Mortley, 2 M. & S. 445.

(*m*) Rex *v.* St. Paul's Bedford, 6 T. R. 452.

(*n*) Williams *v.* Gerry, 10 M. & W. 296.

(*o*) Garnons *v.* Swift, 1 Taunt. 507; Munn *v.* Godbold, 3 Bing. 292. At the trial in this case, after notice to the defendant to produce the counterpart of the deed declared on, the plaintiff proved the loss of his part, which had been executed by the defendant only, and offered the draft in evidence. The defendant's counsel at the same time produced the counterpart, which was executed by the plaintiff only, and unstamped, and insisted that the draft could not be received, because the counterpart was in court, and that the latter was inadmissible because unstamped. The objection was overruled so far as to admit the unstamped counterpart as evidence of the lost deed, and a verdict was found for the plaintiff. The case was carried up on the above objection, and the

statute provides, that a copy of any contract or deed, attested to be a true copy, for the purpose of being given in evidence as a true copy, and made for the security or use of any party to, or beneficially interested in, the original instrument, must be stamped like the original. (*p*) But it is held, that this relates only to such copies as are evidence *per se*, and does not apply where a copy of a document is produced as secondary evidence by a party who has compared it. (*q*)

When a document is held to be inadmissible for want of a stamp, a party cannot be cross-examined as to the contents of it. (*r*) And an attorney cannot be called to testify as to his knowledge whether an instrument was or was not stamped, when exhibited to him by his client in the course of professional business. (*s*) An instrument that is not properly stamped for what it purports to be, may be used on the examination of a witness, as a memorandum to refresh his memory. (*t*) It may also be admitted in evidence to show its own worthlessness; as, for example, a void security, in an action for money lent; (*u*) and if a person were to be sued for the penalty for negotiating a bill without a stamp, the document would of course be evidence. (*v*)

SECTION XIII.

OF RELIEF IN EQUITY.

The terms of disqualification of unstamped instruments, used in the United States statute, are sufficiently comprehensive to exclude them from equitable, as well as legal recognition; they being declared "invalid and of no effect." The intention of the legislature, to deny all efficacy to such instruments, in courts of

court held, that the unstamped counterpart was rightly received as a copy of the deed signed by the defendant, which was proved to be lost.

(*p*) 55 Geo. 3, ch. 184.

(*q*) Braythwayth *v.* Hitchcock, 10 M. & W. 494.

(*r*) Baker *v.* Dale, 1 Fos. & Fin. 271.

(*s*) Wheatley *v.* Williams, 1 M. & W. 533.

(*t*) Rambert *v.* Cohen, 4 Esp. 213; Jacob *v.* Lindsey, 1 East, 460; Catt *v.* Howard, 3 Stark. 3.

(*u*) Enthoven *v.* Hoyle, 13 C. B. 373.

(*v*) See Recuist's Case, 2 Leach. C. Cl. 703.

equity as well as law, is also clearly manifest in the saving clause in favor of instruments stamped by the commissioner as free of all stamp duty; it being declared that they "shall be received in evidence in all courts of law or equity." (*w*)

Equitable relief, on the ground of fraud, or mistake, or for specific performance, would be given in the case of an unstamped instrument, by compelling the maker to execute one duly stamped. (*x*) And, upon principles of equity, it is held, that if a creditor holds two bills or notes, one stamped and the other invalid for want of a stamp, and his debtor pays money generally on account, he may apply it in satisfaction of the one that is unstamped. (*y*) But a court of equity will not give relief upon an instrument void at law for want of a stamp, nor put a party, coming in aid of the law, in a better situation. (*z*)

An agreement between two parties to waive an objection for want of stamp, will not be countenanced in equity any more than at law. (*a*) And it has been decided in equity, that a deed could not be altered by consent, so as to avoid the necessity of restamping. (*b*)

Where a bill for specific performance alleges the existence of an instrument under which the performance is claimed, and the answer admits the allegation as set forth, but denies the effect of the instrument, the court will not require it to be produced in order to see whether or not it is stamped. (*c*)

On a trial by order of a court of equity, upon the special issue as to the term of a lease, the objection for want of stamp will not be received; as the order for the trial precludes the objection, and the equity court is competent to deal with it. (*d*)

(*w*) Act of July 1, 1862, § 103.
(*x*) Aylett *v.* Bennett, 1 Anst. 45; 2 Bridgm. 538.
(*y*) Biggs *v.* Dwight, Man. & R. 308.
(*z*) Touleman *v.* Price, 5 Ves. 240.
(*a*) Owen *v.* Thomas, 3 Myl. & K. 353.
(*b*) —— *v.* Lee, 2 Eq. Ca. Ab. 414.
(*c*) Huddleston *v.* Briscoe, 11 Ves. 583.
(*d*) Harding *v.* Macnamara, 4 Ired. (Law), 191.

CHAPTER XI.

ON REMEDY IN EQUITY, OR SPECIFIC PERFORMANCE.

Sect. 1.—*Of the Origin and Purpose of this Remedy.*

COURTS of law can give no other remedy for breach of contract, than damages. The action of detinue is disused, and, under the rules of law, would not be effectual even in the few cases to which it could ever have applied. But courts of equity give another remedy for a breach of a contract; they compel the party in fault to a specific performance of his undertaking, and the remedy in equity is the more natural of the two, and better fulfils the great object of law, which is the maintenance of the obligation of contracts. For, as it has been well said, in contracts respect is *first* to be had to the things expressed in the agreement, if they may possibly be obtained; and only for *default* of the things themselves is a sufficient equivalent to be given. (*a*)

This power was claimed and exercised by courts of equity, as all their powers were to enable them to supply a manifest insufficiency of the law. But as it would be obviously and extremely inexpedient to have two independent jurisdictions, one antagonistic to the other in its principles and its operation, equity has always preferred, and professed, to "follow the law."(*b*)

(*a*) Treatise on Equity, ch. 1, § 4. The jurisdiction to decree specific performance of contracts, unlike most other branches of equity, is said not to have had its origin in the Roman law, but to be purely the invention of the English clerical chancellors. 1 Spence, Eq. Juris. 220, note (*f*). And to its exercise by the court of chancery in England, one of her most distinguished chancellors, Lord St. Leonards, has attributed that good faith which prevails among the English people in a degree not found in many other countries. See Lumley *v.* Wagner, 1 De G., M. & G. 604, 619, 13 Eng. L. & Eq. 557. He had made a similar observation when Lord Chancellor of Ireland. French *v.* Macale, 2 Drury & W. 273.

(*b*) Equity in decreeing specific performance does, as a learned writer has remarked, but carry out the principles of the common law; giving that remedy

Nor was this profession insincere, or disregarded in practice; but the application of it has been attended with much difficulty. To "follow the law," meaning thereby to go only where that went, and do only what that did, would destroy the peculiar ability of the court of equity. To oppose and set aside, with direct contradiction, the rules and decisions of the law, would be open to still graver objection. And to avoid these extremes; not to violate the law but to fulfil its purposes, and to supply those wants which render its administration of its own principles, imperfect, is the true purpose of equity; and it is equally important and difficult.

To no part of the jurisdiction of equity do these remarks apply more directly than to a decree for specific performance. Such is the apparent inconsistency between the decisions on this subject, and so entire the want of uniformity and harmony in the reasons given for them, that they have been said to be governed merely by the *caprices* of the court. (*c*) But this is certainly untrue and unjust in reference to the general course of equity jurisprudence. (*d*)

One reason for the apparent conflict of authority is, that specific performance is not a matter of mere right, but is, peculiarly, one of discretion. (*e*) It is always the duty of the court to inquire into the peculiar facts and the peculiar merits of each case, and to decide it as they may direct. (*f*) Hence, there is

which the courts of common law would give, if their mode of administering justice were adapted to the case. Mitf. Pl. 118. And see Alley *v.* Deschamps, 13 Ves. 228. What is aimed at is the exact accomplishment of the intention of the parties. French *v.* Macale, 2 Drury & W. 272.

(*c*) See 2 Story, Eq. Jur. § 724, n. 1.

(*d*) Lord Eldon, Ch., in White *v.* Damon, 7 Ves. 35. The conditions which should be fulfilled to entitle the plaintiff to a specific performance, are stated very comprehensively and clearly by Lord Redesdale, Harnett *v.* Yeilding, 2 Sch. & L. 553–555.

(*e*) Watson *v.* Marston, 4 De G., M. & G. 230, 31 Eng. L. & Eq. 167; Mortlock *v.* Buller, 10 Ves. 308; 1 Fonbl. Eq. B. 1, § 9, note (*i*). King *v.* Hamilton, 4 Pet. 311; Waters *v.* Howard, 1 Md. Ch. Dec. 112. 8 Gill, 262. The discretion exercised by a court of equity, when it refrains from executing a contract, is certainly not an arbitrary, but a judicial discretion. If it is a case proper for a specific performance, the court is not at liberty to refuse to grant it. This is what appears to have been the meaning of Sir William Grant, when he said, "Supposing the contract to have been entered into by a competent party, and to be, in the nature and circumstances of it, unobjectionable, it is as much of course in this court to decree a specific performance, as it is to give damages at law." Hall *v.* Warren, 9 Ves. 608. And see Bennett *v.* Smith, 10 Eng. L. & Eq. 274, 16 Jur. 422, *per Turner*, V. C.

(*f*) In Wedgwood *v.* Adams, 6 Beav. 605, Lord *Langdale*, M. R., said: "I conceive the doctrine of the court to be this, that the court exercises a discretion in

perhaps hardly any requirement laid down as absolutely necessary for such a decree, the want of which may not be supplied; and it may be even more strongly said, that no circumstances, and no fact or claims, would lead a court of equity to grant such a decree, if upon the whole case it would certainly work injustice. (*g*) It does not follow, however, that there are not rules which may be distinctly laid down, which the courts generally recognize and regard, and by which the very great majority of cases are decided.

The most general rule, which lies at the foundation of an equitable decree for specific performance, and to which all other rules are or should be subordinate, is, that this equity arises

cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more or less reasonable is not a thing that you can define; it must depend upon the circumstances of each particular case. The court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that, if it abstains from so doing, a measure of damages may be found and awarded in another court. Though you cannot define what may be considered unreasonable by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." But the court will not inquire into equities outside of the case, as it properly presents itself for judicial determination. Thus, if the consideration of the defendant's contract is a covenant of indemnity agreed to be given by the plaintiff, and the plaintiff does give such covenant, his subsequent breach of it is not a ground upon which the defendant can refuse a specific performance of his own agreement. Gibson *v.* Goldsmid, 5 De G., M. & G. 757, 27 Eng. L. & Eq. 588. In that case the maxim, that he who asks equity must do equity, was much discussed, and the extent of its operations defined, by the Lords Justices.

(*g*) Webb *v.* Direct London and Portsmouth Ry. Co., 1 De G., M. & G. 521; Stuart *v.* London and Northwestern Ry. Co., 1 De G., M. & G. 721 (with these two cases compare Hawkes *v.* Eastern Counties Ry. Co., 1 De G., M. & G. 737); Myers *v.* Watson, 7 Eng. L. & Eq. 69, 1 Sim. N. S 523; Seymour *v.* Delancey, 6 Johns, Ch. 223; Clarke *v.* Rochester, &c. Railroad, 18 Barb. 350; Wadsworth *v.* Manning, 4 Md. 59; Waters *v.* Howard, *ubi supra.* Bowles *v.* Woodson, 6 Grat. 78, where the plaintiff's conduct had been such as to induce the defendant to entertain and act upon the belief that the contract was rescinded. See also, Porter *v.* Dougherty, 25 Penn. St. 405. If a contract, fair and equal at the time it was entered into, afterwards, from a change of circumstances (such change not being occasioned by the fault of the defendant), is made to operate with peculiar hardship upon him, a court of equity may refuse to enforce it. Perkins *v.* Wright, 3 Harris & McH. 324, where a specific performance was not granted of an agreement to convey land for a consideration payable in continental money, which had since greatly depreciated. And see Lawrence *v.* Dorsey, 4 Harris & McH. 205. Where a change of circumstances has rendered a specific performance, according to the letter of the contract, inequitable, the court may execute the contract with a proper and conscientious modification, upon the plaintiff's consenting to such modification; and, as Lord Redesdale has said, it is the advantage of a court of equity that it can modify the demands of parties according to justice. Davis *v.* Hone, 2 Sch. & L. 341, 348. The court, in such a case, does not impose the alteration upon the plaintiff, but makes his acceptance of it the condition of its interference in his behalf. Cooper *v.* Pena, 21 Cal. 404

whenever a contract is broken which was binding at law, and the remedy at law is plainly inadequate. (*h*)

Formerly, it is said, the court sent the party to law, and, if he recovered damages, then entertained the suit, but not otherwise. (*i*) There is no such practice now. (*j*) But equity will not give this relief, or relief in the nature of specific performance, in cases where there can be neither remedy nor action at law. (*k*)

(*h*) "It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere. . . . . I will not say courts of equity have in every instance confined themselves within this line; but, this being the principle, I will not deviate from it further than bound by precedent and authority. In the present case, complete justice can be done at law." Sir *Wm. Grant*, M. R., Flint *v.* Brandon, 8 Ves. 163. That was a case where specific performance was refused to be decreed of a covenant by a lessee to fill up or make good a gravel-pit. The general rule is, that a recovery of damages at law precludes a resort to a court of equity. Sainter *v.* Ferguson, 1 Macn. & G. 286. It was in one case ingeniously contended, that a promise to pay the damages suffered by the breach of a covenant in a deed, might be considered as involved in the contract of the covenant, so that the damages having been liquidated by the verdict of a jury, a court of equity had jurisdiction to enforce payment of the sum so assessed, if, by reason of special circumstances, the judgment at law on the verdict could not be perfected; but the attempt was unsuccessful. Jenkins *v.* Parkinson, 2 Mylne & K. 8. With respect to corporations, and persons filling public offices, it is worthy of note, that they may be capable of suing and being sued for some purposes, without being competent parties to a suit of this nature. Thus it does not follow, that because certain persons, vested with special statutory powers, as the Commissioners of Woods and Forests, in England (who have a power to sell or demise certain crown lands, but have no estate in the lands), are enabled in some cases to sue and be sued, that they have a right to sue, or are liable to be sued, in respect of the specific performance of agreements relating to the demise or sale of such lands. Merse *v.* Seymour, 13 Beav. 254. As to infants and married women, *vide post*, Section 7. As to how far the compulsory taking of land by railway corporations, in the exercise of their statutory powers, places the companies and the land-owners in the relative situation of purchasers and vendors, see the judgment of Lord *Cottenham*, C. J., Adams *v.* London and Blackwall Ry. Co. 2 Macn. & G. 127. See also, Clarke *v.* Rochester, &c. R. R. Co. 18 Barb. 350; Gallagher *v.* Fayette Co. R. R. Co. 38 Penn. St. 102.

(*i*) See 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*o*). Lord Chief Justice *Raymond*, in Betesworth *v.* Dean and Chapter of St. Paul's, Sel. Ch. Ca. 69, said: "I take this to be a certain rule of equity, that a specific performance shall never be compelled for the not doing of which the law would not give damages." But the decree in this case was reversed in the House of Lords.

(*j*) Mitf. Pl. by Jerem. 118, n.; 1 Fonbl. Eq. B. 1, ch. 3, § 2, note (*c*).

(*k*) Cannel *v.* Buckle, 2 P. Wms. 243. Thus, although a covenant in gross, or collateral to the land, is not at law binding upon an assignee of the land, yet, if he take with notice of the covenant, he may be restrained from making a use of the land which would be in violation of it. Therefore, where A, in purchasing certain land in fee-simple, covenanted to keep it in an open state, uncovered with any buildings, and in proper repair as a pleasure-ground for the benefit of the occupiers of houses in the neighborhood, it was held, that the vendor might have an injunction against a purchaser from A, with notice of the covenant, to prevent him from building upon the land; and that the question, whether the covenant ran with the land, did not affect the right to the remedy in equity. Tulk *v.* Moxhay, 1 Hall & T. 105, 2 Phillips, 774, s c. before the Master of the Rolls, 11 Beav. 571. And a court of equity will not always refuse to grant this remedy, though the plaintiff has a complete remedy

It is possible for a paintiff to have an interest capable of supporting a bill praying specific performance, although he was not a party to the contract, (*l*) or although he did not disclose his true character at the time of the contract. (*m*) And a specific performance of an entire contract may be granted at the instance of a party who is not solely interested in the fulfilment of it. (*n*)

The contract of which performance is sought must be clearly proved, and its terms should be so specific and distinct as to leave no reasonable doubt of their meaning. (*o*) But the court

at law which he has lost by his own neglect. Lord *Redesdale*, Lennon *v.* Napper, 2 Sch. & L. 684. With respect to the enforcement of an agreement as against creditors of one of the parties, and the consideration that is necessary in such cases, see Alexander *v* Ghiselin, 5 Gill, 138. See also, Beaubien *v.* Beaubien, 23 How. 190, as to equity following the law, in applying the statutes of limitation, where it is sought to enforce a stale claim as an implied trust.

(*l*) Hook *v.* Kinnear, 3 Swanst. 417, n. See Hill *v.* Gomme, 5 Mylne & C. 250, 1 Beav. 540; Colyear *v.* Countess of Mulgrave, 2 Keen, 81, 98; Vernon *u.* Vernon, 2 P. Wms. 594, 4 Bro. P. C. 26. By an agreement between A and B, the latter was to build a house for the former for a stipulated price; and A dying, his son and heir bought his bill against the widow and administratrix to compel her specifically to perform the agreement, and it was decreed accordingly. Holt *v.* Holt, 2 Vern. 322; and see Champion *v.* Brown, 6 Johns. Ch. 402. Marriage contracts differ from others in this, that the issue of the marriage are purchasers under both father and mother; and therefore a marriage settlement cannot be rescinded, even by the consent of all the parties to it, if the interests of the children would be thereby prejudiced. Harvey *v.* Ashley, 3 Atk. 610.

(*m*) Where an agreement for a purchase of land is made by an agent, as if he were purchasing for himself, the principal may enforce specific performance of the contract; and it is no objection that his name was withheld from the vendor at the time it was entered into, unless some inequitable advantage was taken of the vendor, other than any supposed to be inferrible from the mere non-disclosure of the agency, and of the plaintiff's name as purchaser. Nelthorpe *v.* Holgate, 1 Collyer, 203. And if a vendor falsely represented that he was agent in the transaction for a third party, that is no objection to his obtaining specific performance of the contract, unless it be shown that the deception in some way operated to the defendant's prejudice. Fellowes *v.* Lord Gwydyr, 1 Russ. & M. 83, 1 Sim. 63, s. c. before the V. C. If, however, the defendant was unfairly induced to enter into a contract which he would not have made if he had known what party he was really dealing with, a specific performance will not be decreed. Phillips *v.* The Duke of Bucks, 1 Vern. 227; Popham *v.* Eyre, Lofft, 786. Where A and B were the owners of a tract of land, and A having authority from B, contracted with C to sell him the land, by a written agreement containing no reference to B, and not purporting on its face to bind any person as vendor but A; on a bill filed by A and B, praying a specific performance, *McLean*, J., *held*, that the agreement could not be executed for want of mutuality. Bronson *v.* Cahill, 4 McLean, 19. *Sed quære.*

(*n*) Thus, if A, for a consideration, moving from B, contract to confer a benefit on B, and also another benefit on C, B may obtain a specific performance of that contract as an entirety. Ford *v.* Stuart, 15 Beav. 493, 11 Eng. L. & Eq. 166, 172.

(*o*) Harnett *v.* Yielding, 2 Sch. & L. 549, 558; Webb *v.* Direct London and Portsmouth Railway Co. 1 De G., M. & G. 521; (and see the observations of Lord *St. Leonards*, upon this case, in Hawkes *v.* Eastern Counties Railway Co. 1 De G., M. & G 757). Moseley *v.* Virgin, 3 Ves. 184; Ormond *v.* Anderson, 2 Ball & B. 363; Tatham *v.* Platt, 9 Hare, 660, 15 Eng. L. & Eq. 190; Price *v.* Griffith, 1 De G., M. &

is bound by no technical rules in this respect. Nor does it greatly regard the form of the contract. (*p*) Thus, a bond for

G. 80; Morgan *v.* Milman, 3 De G., M. & G. 24; Jackson *v.* Cocker, 4 Beav. 59; Hopcraft *v.* Hickman, 2 Simons & S. 130 (a case of an uncertain award); Colson *v.* Thompson, 2 Wheat. 336; Boston and Maine Railroad Co. *v.* Babcock, 3 Cush. 228; King's Heirs *v.* Thompson, 9 Pet. 204; Stoddert *v.* Bowie, 5 Md. 18; Gill *v.* McAttee, 2 Md. Ch. Dec. 255; Dodd *v.* Seymour, 21 Conn. 476; Soles *v.* Hickman, 20 Penn. St. 180; Parrish *v.* Koons, 1 Pars. Eq. 94. Lord *Manners* refused to grant a reference or issue to ascertain the terms of the contract, where the case, as presented before him, was not one of contradictory evidence, but of no evidence as to essential parts of the contract. Savage *v.* Carroll, 1 Ball & B. 265 In the following cases, the difficulty of some want of certainty existed, but not in a sufficient degree to prevent the court from undertaking to enforce specific performance: Butler *v.* Powis, 2 Collyer, 156; Saunderson *v.* Cockermouth & Workington Railway, 11 Beav. 497; Fitzgerald *v.* Vicars, 2 Drury & W. 298. A contract made abroad, and referring to a custom of the foreign country, may be construed as incorporating the terms of the foreign custom into the agreement, and with such construction may be executed specifically by a domestic court of equity. Foubert *v.* Turst, 1 Bro. P. C. 38. Action taken by the defendant towards a performance of the contract, may remove the difficulty of some want of explicitness in the terms of the contract itself. Price *v.* Corporation of Penzance, 4 Hare, 509. A contract sufficiently certain and definite to enable the court as well to enforce its specific performance as to be assured that in doing so effect is given to the entire agreement between the parties, must be set forth *in the bill.* Allen *v.* Burke, 2 Md. Ch. Dec. 534. In general, a plaintiff who abandons the agreement, as set forth in his bill, and by an amended bill relies upon a different agreement admitted by the defendant in his answer, will be granted a specific performance of such latter agreement; and this on the ground that by his acceptance of the defendant's statements of the contract, he makes it binding upon himself also, so that there is a perfect mutuality. Lord *Redesdale*, C., Lindsay *v.* Lynch, 2 Sch. & L. 1; Willis *v.* Evans, 2 Ball & B. 225. But it follows, from this ground of the rule, that the plaintiff cannot have relief, if, in his amended bill, he does not abandon the contract as originally set forth, but as well insists upon that as asks, in the alternative, for the specific execution of the agreement admitted in the answer. Lindsay *v.* Lynch, *ubi supra.* Where the evidence shows a contract, but one differing materially from that alleged in the plaintiff's bill, the usual practice has been to dismiss the bill without prejudice to a new bill. Legal *v.* Miller, 2 Ves. Sen. 299; Mainwaring *v.* Baxter, 5 Ves. 457; Woolam *v.* Hearn, 7 Ves. 222. See Molloy *v.* Egan, 7 Irish Eq. 590. But the court will not always dismiss the

(*p*) A deed not duly recorded has been regarded as a contract to make a valid conveyance according to its purport. *Chase*, C. J., Moncrieff *v.* Goldsborough, 4 Harris & McH. 283. And see Williams *v.* Mayor of Annapolis, 6 Harris & J. 529. So with a married woman's deed concerning her separate property, inoperative as a conveyance for want of a legal acknowledgment. Tiernan *v.* Poor, 1 Gill & J. 227; Brundige *v.* Poor, 2 id. 1. The statute of frauds does not appear to have been pleaded in these cases. It was long ago held, that a deed which had become void by matter subsequent, might be ground for a suit in equity for a specific performance; as where a woman, being obligor, married the obligee. Cannel *v.* Buckle, 2 P. Wms. 242. An award may be enforced specifically as an agreement, wherever a direct agreement between the parties would be so enforced. Hall *v.* Hardy, 3 P. Wms. 190; Wood *v.* Griffith, 1 Swanst. 54; McNeil *v.* Magee, 5 Mason, 244. An award, which in itself was not binding upon either party, was specifically performed at the instance of one of the parties, who had done acts of part performance. Norton *v.* Mascall, 2 Vern. 24, 1 Eq. Cas. Ab. 51. But an agreement to refer to arbitration will not be executed in equity. Mitf. Pl. 264, 265; Gourlay *v.* Somerset, 19 Ves. 431. See further upon the subject of award, *post*, § 4, where awards ascertaining the price of land are treated of, and also § 5, under the head of Part Performance.

money, with a penalty for not doing a certain thing, will be held to be a contract to do that thing. (q) Nor is a seal regarded as necessarily making a contract valid, if it would be void without one. (r)

If the nature of any particular contract be such, that a court of equity, upon the established rules governing the enforcement of specific performance, ought to listen to one of the parties if he should ask its aid, it will be willing, upon a principle of even-handed dealing, to grant a specific performance of the contract at the instance of the other party also, although his case *per se* would not be strictly within the reason of this jurisdiction of equity; and the circumstance that the former party could not in point of fact have made out his case by reason of some rule of evidence, e. g. the provisions of the statute of frauds, will not of itself affect the equity of the plaintiff, nor prevent the court from granting him relief, *his* case being sup-

bill. Where the plaintiff has not been in fault, and especially if he have done acts of part performance, he may have leave to amend his bill in conformity with the proof, and then take a decree for a specific performance. Harris *v.* Knickerbocker, 5 Wend. 638; Tilton *v.* Tilton, 9 N. H. 585. See Beard *v.* Linthicum, 1 Md. Ch. Dec. 348. Sometimes a decree will be granted him upon the bill as it stands, without amendment. Mortimer *v.* Orchard, 2 Ves. Jr. 243; Bass *v.* Clivley, Tamlyn, 80. In Drury *v.* Conner, 6 Harris & J. 288, the plaintiffs having failed to establish the contract, as alleged in the bill, which was an agreement for the sale of a certain tract of land, a decree was nevertheless granted by the Court of Appeals (reversing the decision of the Chancellor, who had dismissed the bill), for a conveyance of one fourth of the tract, the evidence showing an agreement for the sale of so much. *Martin*, J., in giving the opinion of the court, distinguished the case, where the contract proved is of an entirely different character from that alleged in the bill, from the case where the plaintiff only fails to make out his claim *to the extent* in which he set it up. In this case the statute of frauds was pleaded, and the defendants resisted the contract *in toto.* Compare Small *v.* Owings, 1 Md. Ch. Dec. 363, where Drury *v.* Conner does not appear to have been brought to the attention of the learned Chancellor. If the plaintiff state in his bill, as part of the agreement, something which he does not prove, but which would operate altogether against himself, the failure of proof in this respect will not defeat his prayer for a specific performance. Mundy *v.* Jolliffe, 5 Mylne & C. 176; Gregory *v.* Mighell, 18 Ves. 328. See Beard *v.* Linthicum, 1 Md. Ch. Dec. 349.

(q) Cannel *v.* Buckle, 2 P. Wms. 242; Hopson *v.* Trevor, 1 Stra. 533; Logan *v.* Wienholt, 1 Clark & F. 611; Dewey *v.* Watson, 1 Gray, 414; Plunkett *v.* Methodist Episcopal Society, 3 Cush. 561. For a court of equity does not regard a provision for the payment of a penalty as giving the party an election to break his contract upon paying for his violation of it, and will therefore compel a specific fulfilment of the agreement; and this applies as well where the appropriate remedy is injunction, as where it is specific performance. Drury *v.* Macale, 2 Drury & W. 275.

(r) Howard *v.* Hopkyns, 2 Atk. 371. A seal does not in equity establish a presumption of a consideration, so as to take the case out of the operation of the rule that a voluntary agreement cannot be executed. Black *v.* Cord, 2 Harris & G. 100.

ported by the requisite evidence. (*s*) But if a party, claiming specific performance, with a distinct knowledge of the repudiation of the contract, has suffered a long period of time to elapse, without taking any steps to assert his rights, the lapse of time and laches will preclude him from relief in equity. (*t*)

In general, all the rules of construction and of evidence are the same as at law, although they may be applied with greater freedom to the especial merits of each case. (*u*)

A rule of frequent occurrence in equity applies to many cases in which specific performance is sought; it is that equity will consider that as done which ought to have been done. (*v*) Thus, one who has entered into a valid contract for the purchase of land, is considered by the court as already an equitable owner. He may devise it; and it will pass by descent to his heir. (*w*)

Another rule not only binds the legal representatives of all parties to contracts (which the law does to a great extent), and requires specific performance by executors, administrators, or heirs, of contracts which would have been enforced against the deceased had he been living; (*x*) but it extends this doctrine

(*s*) Where the plaintiff had assigned a lease to the defendant, on the faith of his agreement to pay the plaintiff an annuity, and furnish him a house worth £10 a year to live in, and the objection was made that the plaintiff's demand, being merely pecuniary, he had no equity, *Knight Bruce*, V. C., said: "I am satisfied that this is a case in which the court ought not to decline jurisdiction. A case is stated, in which, setting the statute of frauds out of the question, a bill might have been maintained by the defendant against the plaintiff, to compel him to execute the assignment. That, therefore, is a reason to compel the performance of the terms upon which the plaintiff agreed to execute the assignment." Clifford *v.* Turrell, 1 Younge & C., Ch. 138, 150. And see Withy *v.* Cottle, 1 Simons & S. 174, cited *infra*.

(*t*) Alloway *v.* Braine, 26 Beav. 575. See also, as to effect of delay, Sharp *v.* Wright, 28 Beav. 150.

(*u*) *Sugden*, L. C., Croker *v.* Orpen, 3 Jones & La. T. 599. And see Croome *v.* Lediard, 2 Mylne & K. 251; Union Bank *v.* Edwards, 1 Gill & J. 364; Parkin *v.* Thorold, 2 Simons, N. S. 7, 11 Eng. L. & Eq. 275. Compare opinion of Sir Wm. Grant, M. R., Kenneys *v.* Proctor, 3 Ves. & B. 58. An omission in a written agreement, whether it happened by mistake or fraud, may be proved by parol, and will be ground for refusing a specific performance of the contract as it stands. Joynes *v.* Statham, 3 Atk. 388; Ramsbottom *v.* Gosden, 1 Ves. & B. 168; Winch *v.* Winchester, 1 Ves. & B. 378; *Wilde*, J., Brooks *v.* Wheelock, 11 Pick. 440; Best *v.* Stow, 2 Sandf. Ch. 298; Honeyman *v.* Marryatt, 6 H. L. Cas. 112. See Rich *v.* Jackson, 4 Bro. Ch. by Belt, 514, n. (1).

(*v*) Equity looks upon things agreed to be done as actually performed. Treat. on Eq. B. 1, ch. 6, § 9. But nothing is looked upon in equity as done, but what ought to have been done, not what might have been done; nor will equity consider things in that light in favor of everybody, but only for those who had a right to pray that it might be done. Sir Thomas Clarke, M. R., Burgess *v.* Wheate, 1 W. Bl. 129; 1 Fonb. Eq. 5th ed. 419.

(*w*) Lord *Eldon*, C., Seton *v.* Slade, 7 Ves. 274.

(*x*) The rule is, said *Sir Thomas Clarke*,

to all persons who have a certain privity of estate and interest. (*y*) Thus, if an owner of land makes a valid contract to sell it to another purchaser who takes possession, equity will inquire whether this second purchaser had notice or knowledge of the first bargain; and if he had, will decree specific performance, or the conveyance of the land to the first purchaser, against him as it would against the original owner. (*z*) So if a landlord demise certain premises by a lease, and a third party enter upon the premises with the consent and permission of the lessee, this third party will be considered, as to all the landlord's rights, as in under the lease, although he disclaim all privity with the tenant. (*a*)

Burgess *v.* Wheate, 1 W. Bl. 129, that the remedy in equity shall either be between the parties who stipulate what is to be done, or those who stand in their place. The rule applies between successive personal representatives; thus the contract of an administrator, made in a due course of administration, may be enforced against an administrator *de bonis non.* Hackett *v.* McNamara, Lloyd & G., *cas. temp.* Plunket, 283.

(*y*) A, one of two coparceners, without authority from B, the other coparcener, executed a deed purporting to convey a portion of the land by metes and bounds to C. Afterwards A and B jointly conveyed the whole land to D, who had notice of the previous transaction; in the deed from A to C, B's name was inserted as one of the grantors, though he had neither consented thereto, nor did he in point of fact, execute the instrument; C filed a bill against D, setting up such deed as an agreement for the conveyance of the parcel of land therein mentioned, and prayed a specific performance, which was granted. McKee *v.* Barley, 11 Gratt. 340. *Sed quære.* This case is certainly an extreme one.

(*z*) Taylor *v.* Stibbert, 2 Ves. Jr. 437. See Buttrick *v.* Holden, 13 Met. 355. So also in the case of a chattel. Clark *v.* Flint, 22 Pick. 231. In like manner the vendor may enforce the contract against an assignee of the vendee, or rather against the land in his hands. Champion *v.* Brown, 6 Johns. Ch. 402. And the assignee of the vendor may have an equity to a specific performance. Thus a purchaser having given his note for the purchase-money to the vendor, who assigned it for value to the plaintiff, it was held, that the latter might maintain a bill for a specific execution of the contract of sale, making both the vendor and the purchaser defendants; in which proceeding the vendee might be required to pay the money to the plaintiff, and the vendor thereupon to deliver a deed of conveyance to the vendee. Hanna *v.* Wilson, 3 Gratt. 243, which see for a form of decree in such case, giving also to the plaintiff the security of the vendor's lien. A mortgagee who purchases the equity of redemption, may be compelled to execute an agreement for lease entered into by the mortgagor, of which agreement the mortgagee had notice when he purchased. Smith *v.* Phillips, 1 Keen, 694. As to the performance of a contract of an ancestor in tail, by the heir, see Partridge *v.* Dorsey, 3 Harris & J. 302.

(*a*) Howard *v.* Ellis, 4 Sandf. 369.

SECTION II.

OF CONSIDERATION.

Equity fully adopts the rule, that no contract shall be enforced which does not rest upon a valuable consideration, but construes and applies it somewhat more rationally and less technically. Thus equity will not enforce a mere voluntary contract; for it permits one to withhold what he has, of his own accord, and not from any benefit to himself or expectation of any benefit volunteered to promise. (*b*) And yet if the promisee, on the faith of the promise, does some act, or enters into some engagement or arrangement, which the promise justified, and which a breach of the promise would make very injurious to him, this, equity might regard as confirming and establishing the promise, in much the same way as a consideration for it would. (*c*) Equity, moreover, adopts the legal rule, that a benefit conferred, received, or held, is a valuable consideration, and gives to this rule an enlarged and liberal construction and application. (*d*)

(*b*) Callaghan *v.* Callaghan, 8 Clark & F. 374; Osgood *v.* Strode, 2 P. Wms. 245; compare Vernon *v.* Vernon, id. 594, 600; Cox *v.* Sprigg, 6 Md. 274; Black *v.* Cord, 2 Harris & G. 100. An agreement in writing by a landlord to reduce the rent, followed by his acceptance of the reduced rent, during seven years, being without consideration, cannot be enforced. Fitzgerald *v.* Lord Portarlington, 1 Jones, 431. Nor can a creditor's separate agreement to accept a part of his debt in satisfaction of the whole. Acker *v.* Phœnix, 4 Paige, 305; Gurley *v.* Hiteshue, 5 Gill, 222.

(*c*) Crosbie *v.* McDoual, 13 Ves. 148; King's Heirs *v.* Thompson, 9 Pet. 204. *Gibson*, C. J., Rerick *v.* Kern, 14 S. & R. 271; Shepperd *v.* Bevin, 9 Gill, 32, where it was held, that money expended in improvement of land by a son, on the faith of an agreement of his parent to convey the land to him, constituted a consideration for which specific performance might be decreed against heirs of the parent. Upon a bill filed for a partition and an answer, setting up a contract of the ancestor to convey the land to the defendant, and showing long possession held, and expensive improvements made on the faith of the contract, a court of equity requires a less strong case to be made out by the defendant than if he were seeking specific performance of the contract, and may therefore refuse to interfere in behalf of the plaintiff, although the defendant could not prove the terms of the contract with that precision which would be necessary in an application for specific performance. See Haines *v.* Haines, 4 Md. Ch. Dec. 133, 137. And see Hill *v.* Gomme, 5 Mylne & C. 250, 255; Morgan *v.* Rainsford, 8 Irish Eq. 299. But see McClure *v.* McClure, 1 Barr, 374.

(*d*) Edwards *v.* Grand Junction Railway Co. 1 Mylne & C. 650.

So, too, equity adopts the legal principle, which, for most purposes, confines the necessity for valuable consideration, to promises which are executory. If they are executed wholly, or if not wholly, yet in a substantial degree, and there remains something to be done, to complete the title, or otherwise render the enjoyment of the thing more beneficial to the plaintiff, equity will require that thing to be done, although the promise was wholly voluntary. (*e*) This is often done by considering the donor, or other party defendant, as a trustee for the plaintiff, if the donor has done enough to vest an equitable title in the plaintiff. (*f*) Thus, if an instrument of gift has been fully executed, but not delivered, and the circumstances leave the donor no moral right to withhold the delivery, equity will regard him as holding it for the donee. (*g*) So it would be if the donor had formally, by his declaration of trust, assumed the character of trustee. (*h*) Or, if a legal right which could be enforced by law, were vested in the trustee for the plaintiff. (*i*) Or, if a chose in action had been transferred, equitably, to the plaintiff, and it was necessary that his title or interest should be confirmed. (*j*)

(*e*) Ellison *v.* Ellison, 6 Ves. 656; Kekewich *v.* Manning, 1 De G., M. & G. 176, 12 Eng. L. & Eq. 120; Bunn *v.* Winthrop, 1 Johns. Ch. 329. But a mere delivery of possession of land under a parol gift, though the donor be father to the donee, is not a ground upon which a conveyance can be decreed. See Stewart *v.* Stewart, 3 Watts, 253.

(*f*) See the judgment of *Sir William Grant*, M. R., Antrobus *v.* Smith, 12 Ves. 45; the judgments of Sir *James Wigram*, V. C., Hughes *v.* Stubbs, 1 Hare, 479; Meek *v.* Kettlewell, id. 469; and Fletcher *v.* Fletcher, 4 id. 73; the judgment of Sir *John Leach*, M. R., Fortescue *v.* Barnett, 3 Mylne & K. 42; and the judgment of Lord *Lyndhurst*, V. C., Meek *v.* Kettlewell, 1 Phillips, 347. See Coningham *v.* Plunkett, 2 Younge & C., Ch. 245.

(*g*) Exton *v.* Scott, 6 Sim. 31; Fletcher *v.* Fletcher, 4 Hare 67; Bunn *v.* Winthrop, 1 Johns. Ch. 329. But compare Dillon *v.* Coppin, 4 Mylne & C. 647; Antrobus *v.* Smith, 12 Ves. 39.

(*h*) Wheatley *v.* Purr, 1 Keen, 551.

(*i*) Fletcher *v.* Fletcher, 4 Hare, 67; Sloane *v.* Cadogan, 3 Sugden on Vendors & Purchasers, App. No. xxvii.

(*j*) *Ex parte* Pye, 18 Ves. 140; M'Fadden *v.* Jenkyns, 1 Phillips, 153, 1 Hare, 458. But see Kennedy *v.* Ware, 1 Barr, 445. A, without consideration, appointed the plaintiff his attorney, with power to procure to the plaintiff's own use whatever lands A was entitled to for military service; a warrant afterwards issued in the name of A, and after his death a patent was granted upon the warrant to his heirs; it was held, that they held the land as trustees for the plaintiff. Read *v.* Long, 4 Yerg. 68. The doctrine that a consideration is not necessary to the creation or assignment of a trust, has been placed upon an enlarged and stable foundation by the recent decision of the Lords Justices in Kekewich *v.* Manning, 1 De G., M. & G. 176, 12 Eng. L. & Eq. 120. And this case, with Voyle *v.* Hughes, 2 Smale & G. 18, 23 Eng. L. & Eq. 271, 18 Jur. 341, is of the first importance to an understanding of the existing state of the law upon the whole subject of the voluntary alienation of chattels.

The consideration need not be adequate in equity, any more than at law; (*k*) but if it be grossly inadequate, it would be disregarded, and the contract considered void, although the consideration were technically valuable and sufficient at law. (*l*) And if the inadequacy be not so great as to avoid the contract, still, if it be sufficient to give to the contract the character of hardship or oppression, equity will leave the plaintiff to his remedy at law. (*m*)

If there is a contract, with valuable consideration, and this contract benefits a third party who is only collaterally interested, and from whom no part of the consideration comes, the contract will not be enforced in equity, on the application of this collateral party. (*n*) But if it be enforced on the application of other parties, it will be enforced altogether and throughout. (*o*)

(*k*) MacGhee *v.* Morgan, 2 Sch. & L. 395, *n.*; Lord *Eldon*, Coles *v.* Trecothick, 9 Ves. 246. See Western *v.* Russell, 3 Ves. & B. 193. Between parent and child, and especially after the death of the former, in a contest with his other heirs, a slight consideration will be sufficient to support an application by the child for a specific performance. Shepherd *v.* Bevin, 9 Gill, 32. And see Haines *v.* Haines, 6 Md. 440, per *Le Grand*, C. J. And the doctrine, that where there is a near relationship between the parties, a smaller consideration will suffice, than would be requisite between strangers, was maintained by Sir *Edward Sugden*, C. J.; Moore *v.* Crofton, 3 Jones & La. T. 443. A compromise of a doubtful claim is a sufficient consideration. Attwood *v.* ——, 1 Russ. 353, 5 id. 149.

(*l*) Especially if there are other circumstances tending to render it probable that a fraudulent advantage may have been taken, as where the vendor was illiterate, and does not appear to have had the writings explained to him. Robinson *v.* Robinson, 4 Md. Ch. Dec. 176. And a degree of inadequacy, which would not be regarded in ordinary cases, will prevent the enforcement of a contract for the sale of an heir's expectancy, or of a reversioner's reversionary interest. Peacock *v.* Evans, 16 Ves. 512; Ryle *v.* Brown, 18 Price, 758.

(*m*) Day *v.* Newman, 2 Cox, 77; Powers *v.* Hale, 5 Foster, 145; Seymour *v.* Delancy, 6 Johns. Ch. 222, 3 Cowen, 445, where a price, only half of the value of the property, was considered inadequate. The opinions of Chancellor *Kent* and Chief Justice *Savage*, in this case, contain an elaborate review of the prior decisions. And see Howard *v.* Edgell, 17 Vt. 9, 28. It seems that a price, only one fourth of the actual value, is certainly such a gross inadequacy as to forbid the interposition of equity. *Johnson*, C., Robinson *v.* Robinson, 4 Md. Ch. Dec. 182, 183. But see Erwin *v.* Parham, 12 How. 197. If the inadequacy be so great as to prove fraud, or that the parties could not have intended a contract of sale, in either of these cases, a conveyance will not be compelled. Callaghan *v.* Callaghan, 8 Clark & F. 374. See Coles *v.* Trecothick, 9 Ves. 246.

(*n*) Wallwyn *v.* Coutts, 3 Meriv. 707; Colyear *v.* Countess of Mulgrave, 2 Keen, 81; Sutton *v.* Chetwynd, 3 Meriv. 249; see s. c. Turner & R. 296; Owings's case, 1 Bland, 401. "I apprehend," said Lord *Langdale*, M. R., 2 Keen, 98, "that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other."

(*o*) Ford *v.* Stuart, 15 Beav. 493, 11 Eng. L. & Eq. 172; Davenport *v.* Bishopp, 2 Younge & C., Ch. 451, 1 Phillips, 698. In this case, *Knight Bruce*, V.

Equity makes the same distinction which exists at law, between a promise made before a consideration, and therefore resting upon it, and a promise made after the consideration is exhausted, and therefore not supported by it. (*p*) Thus, specific performance will be decreed of a promise made before a marriage, and in contemplation of it; but not, generally, of a promise made after a marriage has taken place, although made in reference to it, and in consequence of it. (*q*)

And this brings us to a question which has been more discussed than any other, perhaps, under the head of consideration. It is, whether merely meritorious considerations, so called in law to distinguish them from valuable considerations, are sufficient in equity to sustain an application for specific enforcement. (*r*)

Natural affection, as for a wife, child, or parent, or other relative, is a moral and meritorious consideration, for a promise to make provision for the object of this love. But it is not a valuable consideration, and will not sustain a promise at law. Whether equity differs from law, in this respect, cannot be positively determined from the authorities, for on this question they are wholly irreconcilable. It is obvious, that to regard these considerations always sufficient in equity, would be to set entirely aside the principle that "equity follows law," and will

C., said: "I apprehend, that if two parties in contemplation of a marriage intended and afterwards had between them, or for any other consideration between themselves coming under the description of 'valuable,' have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each, a stranger to the contract, and a person from whom not any valuable or meritorious consideration moves, has moved, or is to move, it cannot, generally speaking, be competent to one party to the contract or to those representing that party in estate, to say to the other party to the contract, 'Whatever may be your wishes, whether you assent or dissent, that stipulation shall go for nothing, or shall not have effect given to it.' The two parties to the contract having made the stipulation with each other, mutual assent must generally be requisite to dissolve that, which, by mutual assent, was created. With the question between them, the gratuitousness of the provision towards the stranger, so far as the stranger is concerned, seems generally to have little or nothing to do." 2 Younge & C., Ch. 460, 461.

(*p*) Morgan *v.* Rainsforth, 8 Irish Eq. 299, 311.

(*q*) Pulvertoft *v.* Pulvertoft, 18 Ves. 84: Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180, 2 Ves. & B. 200; Buckle *v.* Mitchell, 18 Ves. 112.

(*r*) See King *v.* Withers, Prec. Ch. 19, where a specific performance was granted of a voluntary agreement by a scrivener to make satisfaction to his client for a loss occasioned by his own imperfect examination of a title.

enforce only a legal contract; or would introduce an exception which leaves but little of the rule untouched. But, on the other hand, it may be said, that equity cannot refuse on that ground to enforce a contract, which is entitled in every respect to its assistance, without forgetting that its general purpose is to moderate the rigor of law, and supply its deficiencies, and bring it into harmony with conscience and moral justice. So far as the authorities go, it might possibly be inferred, from an analysis of them, that the weight of authority in England is against the sufficiency of these considerations, in equity; and perhaps in this country also. (*s*)

We are inclined to think a principle may be found, which would harmonize many cases that are now irreconcilable, and perhaps come as near supplying a general rule as any other that could be devised. It is, that the court would decree specific performance of a promise made on merely meritorious considerations, when the promise itself was plainly a duty, either because the promisor had been empowered by others to do this very thing, or could be regarded on any ground as a quasi trustee for this purpose; or made the promise under such circumstances that the court would listen favorably to an application for the provision, even if there had been no promise. And, in other cases, the court would consider the promise as merely voluntary, and therefore to be left to the discretion or pleasure of the promisor.

SECTION III.

OF CONTRACTS RELATING TO PERSONALTY.

There is a distinction taken in equity, in regard to specific performance, which may now be considered as well established,

(*s*) Sir *Edward Sugden*, C., Moore *v.* Crofton, 3 Jones & La T. 442, 443, and note his remarks upon Ellis *v.* Nimmo, 1 Lloyd & G. *temp.* Sugd. 333; Dillon *v.* Coppen, 4 Mylne & C. 647; Jefferys *v.* Jefferys, Craig & Ph. 138; Pennington *v.* Gittings, 2 Gill & J. 217; Shepherd *v.* Bevin, 9 Gill, 39, 40; Hayes *v.* Kershaw, 1 Sandf. Ch. 258; Kennedy *v.* Ware, 1 Barr, 450. But see Argenbright *v.* Campbell, 3 Hen. & M. 144; Bunn *v.* Winthrop, 1 Johns. Ch. 337.

and perhaps capable of sufficient explanation and defence, but which is, nevertheless, open to some objection. This is, the distinction made between contracts which relate to land, and those which relate only to personal chattels; the general rule being, that equity will give this relief in contracts of the first kind, but not in those of the latter kind. (*t*)

The general reason assigned for this, is, that equity interferes only where the law gives no adequate remedy; and in nearly all contracts for chattels, the question is only one of price or pecuniary value; and payment of money or damages, will dispose fairly of the whole question. And it may be stated as one of the rules on this subject, that equity will not decree specific performance, unless something more is to be done by it than mere payment of money or any thing which ends in the mere payment, because the law is adequate to this. (*u*)

(*t*) Brough *v.* Oddy, 1 Russ. & M. 55. A contract to sell land creates *per se* the relation of trustee and *cestui que trust;* for, being enforceable in equity, the parties, on the principle that what they are bound to do they may be considered as having done, occupy towards each other in equity the same position which they would occupy at law, were the contract in fact performed; the vendor is trustee of the estate for the vendee; the vendee, trustee of the purchase-money for the vendor. With respect to a personal chattel, equity will enforce a *trust* concerning it, but not (except under special circumstances) a contract. Hence, in inquiring in any case whether there is a trust of a chattel, it is to be remembered, that the mere contract of sale and delivery cannot (as it would in the case of land) create a trust; the contract must here be completed by the parties themselves before the trust can arise which equity will exercise jurisdiction over. This course of reasoning is very clearly presented in the opinion of Sir *John Romilly*, in Pooley *v.* Budd, 14 Beav. 44, 7 Eng. L. & Eq. 229: "It is therefore important," continued the Master of the Rolls (14 Beav. 45), "to bear in mind in this case, that as equity would not enforce the specific performance of the contract for the sale and delivery of the iron, the relation of trustee and *cestui que trust* cannot spring merely from the contract, and that, if it exist at all it must be shown to exist from something beyond the mere contract entered into between the company and *Scale* for the sale and delivery of iron. At the same time, if the contract were complete so far as the company were concerned, that is to say, if they had been paid every penny they were entitled to, and if they had no claim upon or interest in the iron arising from the contract, and the contract only remained unperformed to this extent, that the iron had not been delivered to the purchaser, I should entertain no doubt but that the company would then and thereby become mere trustees of the iron sold, for the benefit of the real purchaser, or the person entitled to claim it under him."

(*u*) Sir *William Grant*, M. R., Flint *v.* Brandon, 8 Ves. 163; *McCoun*, V. C., Phyfe *v.* Wardell, 2 Edw. Ch. 51. But, if the circumstances of the case are such, that peculiar difficulties exist in the way of the recovery of the price of personal chattels which have been sold and delivered, the vendor may have a specific performance of the contract in equity. See Fellowes *v.* Lord Gwydyr, 1 Russ. & M. 83, 1 Sim. 63. And if the purchaser of a chattel would be entitled to claim a specific performance of the agreement, the vendor, on his part, may also obtain a specific performance, for the court will extend the same remedy to both parties. Withy *v.* Cottle, 1 Simons & S. 174; Phillips *v* Berger, 8 Barb. 527.

But where the plaintiff has purchased land, and seeks the aid of the court to obtain it, it may be supposed that he bought it for some reason besides its mere pecuniary value. He wanted it as a home; and whether for residence or cultivation, it is worth more to him than the mere price it would bring in the market, and therefore he had paid this price. But the pecuniary value would be the measure of damages in law, and therefore he would suffer if equity did not interfere.

One answer to this would be, that a jury might include most of these grounds of value in their verdict. Another, and a better one perhaps, is, that land has now become so much a subject of purchase and sale, like merchandise, that the reason for this distinction has lost much of its weight. Still another might be, that one ground of the inadequacy of legal remedy, is equally common to all contracts for the breach of which damages are recoverable; and this is the entire dependence on the personal responsibility of the defendant for the value of the judgment. This last view, seldom, however, seems to enter into the consideration of courts of equity; as they take it for granted that what a party is bound by law to do, he can do, and will do. But where one surety has claims for contribution against many co-sureties, some of whom are insolvent, equity will omit them in determining how much each of the solvent co-sureties shall pay, thus casting upon the surety who is plaintiff only his share of the loss arising from their insolvency; while the law, in most of our States, would give a plaintiff, in such a case, only the aliquot share from each, which each would pay if all were able to pay. (*v*) Nor is this consideration always disregarded in proceedings in equity, on a bill for specific performance. Thus, in a suit for the transfer of stock, according to a contract of sale, Sir John Leach, Vice-Chancellor, decreed performance, giving as his final reason, that "a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party." (*w*)

(*v*) *Ante*, vol. 1, p. 33.

(*w*) Doloret *v.* Rothschild, 1 Simons & S. 598. Where a factor had made advances on an agreement that the principal would consign to him the crops of the year, and the principal died, leaving a personal es-

After all that may be said, the reasons for this distinction retain so much of their force, that the rule founded upon it, with modifications and exceptions introduced in the practice of equity, must be regarded as established, and as useful. (x) Thus, agreements to form a partnership, although they relate altogether to chattel interests, might be enforced; (y) and so will most agreements in relation to a partnership. (z) Indeed, the inadequacy of legal process and remedy is so obvious, upon many important questions relating to partnership, that the whole subject may be considered as peculiarly within the action of equity, Still, no agreement for a partnership will be enforced, unless it be an agreement for a specific time; (a) for a partnership without limit is dissolvable at the pleasure of any partner; and to decree such a partnership would of course be useless. And now, when there are so many ways of dissolving or rendering nugatory a partnership for a time certain, it may be supposed that equity would require a plain and strong case

tate insufficient to pay his debts, it was *held*, that the factor had a good ground to seek a specific performance of the agreement at the hands of the executor, so that his lien might attach upon the crops and the proceeds of the sale of them, and the necessity of a resort to the testator's real estate for the payment of his advances, be prevented. Sullivan *v.* Tuck, 1 Md. Ch. Dec. 59.

(x) And the distinction between land and a chattel may, perhaps, be stated thus; that in the case of the former, there is a conclusive presumption that the purchaser cannot be adequately compensated by the recovery of damages at law; while in the case of the latter, there is no such presumption, and in order to induce the interposition of the extraordinary jurisdiction of equity, it must appear affirmatively, from the circumstances of the particular case, that the remedy at law is inadequate. When the case is thus made out affirmatively, — when that is *proven* which, when real estate is in question, is *presumed*, — equity interferes as readily to enforce a sale of a chattel as a sale of land.

(y) Lord *Hardwicke*, C., Buxton *v.* Lister, 3 Atk. 385. Lord *Langdale*, M. R., in reference to the impossibility of accomplishing, by means of a reluctant and compelled partnership, the full beneficial results of a voluntary concert of action, said: "This is a difficulty that always arises when partnership contracts come under the consideration of this court. It is impossible to make persons, who will not concur, carry on a business, jointly, for their own common advantage. It is that which makes every thing of this kind exceedingly uncertain. It is that which makes this court, on all such occasions, exceedingly anxious (an anxiety, I believe, that has been felt by every judge who has ever sat in a court of equity), that when these disputes do arise, the parties should, if possible, come to some arrangement between themselves, to do that for their common benefit which the court cannot do otherwise than at the common expense. But if the parties insist on having a declaration of their rights, the court has over and over again entertained the jurisdiction, and must entertain the jurisdiction, unless some one or two or several partners are to be permitted to do just what they like with the partnership rights and interests." England *v.* Curling, 8 Beav. 137, 138.

(z) Birchett *v.* Bolling, 5 Munf. 42. Respecting the specific execution of a covenant of a partner, that his personal representatives after his death shall continue the partnership, see Downs *v.* Collins, 6 Hare, 418, 437.

(a) Hercy *v.* Birch, 9 Ves. 357.

for compelling the formation of one. For some collateral purpose, it may however be requisite, that an agreement for a partnership, terminable at pleasure, should have been made, and then equity will decree that it be considered as having been made at a time and in a manner necessary for this equitable result. (*b*)

So, too, if a partner contracts that he will labor assiduously for the benefit of the partnership, or comes under any similar obligation, the courts of equity will not decree a specific performance, because the bargain is not itself *specific* enough, and it would be difficult to say what was a specific performance of it. But if a partner agree, that while the partnership continues he will not enter into any other firm, or if he agrees not to carry on any other mercantile business whatever, equity will restrain him from the violation of such an agreement. (*c*) And it is a general rule (subject, however, to qualification in certain particular cases), (*d*) that a contract for personal services cannot be specifically enforced by either party. (*e*)

(*b*) Mr. *Swanston*, in his note to Crawshay *v.* Maule, 1 Swanst. 513. And see Nesbitt *v.* Meyer, 1 Swanst. 226.

(*c*) *Shadwell*, V. C., Kemble *v.* Kean, 6 Sim. 335.

(*d*) See *post*, p. 375, note (*p*), and section 7.

(*e*) It is obvious, that almost every contract for personal services, of whatever grade or kind, admits of a full compensation being made in money to the agent or servant for the breach of it by the employer. The relation created by such a contract is one frequently requiring a high degree of confidence on the part of the master or principal; and therefore, in addition to the adequacy of the remedy in damages, as a reason for withholding enforcement of the contract specifically, there is a want of equality in the position of the two parties which is also considered as rendering the interference of a court of equity improper. Though the servant perform the required work never so well, yet if the master want confidence in him, he does not derive from his services that sense of satisfaction which is an essential element of their value; while, on the other hand, the utmost that the servant seeks is money, and that he can recover at law. "A man," said the Lord Justice *Knight Bruce*, in Johnson *v.* Shrewsbury & Birmingham Ry. Co. 3 De G., M. & G. 926, "may have one of the best domestic servants, he may have a valet, whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him; and while, on the other hand, all that the servant requires or wishes (and that reasonably enough), is money, you are, on the other hand, to destroy the comfort of a man's existence for a period of years, by compelling him to have constantly about him, in a confidential situation, one to whom he objects. If that be so in private life, how important do these considerations become when connected with the performance of such duties — duties to society — as are incumbent upon the directors of a company like this." The case which gave rise to these remarks was one where parties who had contracted with the directors of a railway company to run, work, and man their trains, and perform other very considerable duties for them, attempted to compel the company to permit them to continue to perform the services they had engaged for, and the remedy prayed was

Equity will decree specific performance of a bargain for the sale of a good-will of a trade, provided it be connected with any specific stock in trade, or with some valuable secret of trade, (*f*) or with a well-established stand for business; (*g*) but not, it is said, a naked bargain for good-will, because equity could not direct the way in which the defendant should proceed to turn the custom of those who had dealt with him, to the plaintiff. (*h*)

So a lease will be decreed, or the renewal of one, if it has been agreed for, and there remains a valuable portion of the time for which the lease was to run; (*i*) or even if the time have all expired, and there is sufficient reason that the lease should be made and treated by the defendant as of the day when by the bargain it should have been made, the court will decree that it be now made as of that day, and so held by the parties. (*j*)

Among instances in which equity has decreed specific performance of contracts relating only to chattels, may be mentioned one for the purchase of an annuity, payable out of the dividends of certain stocks (*k*) a contract for the purchase of debts which had been proved under a commission of bankruptcy; (*l*) and in

not granted. The circumstance that the plaintiff's reputation might suffer from the dismissal from the service of the defendants, was said to be no ground for interference, since such injury, also, might be compensated in damages. See also, Pickering *v.* The Bishop of Ely, 2 Younge & & C. Ch. 249, 267; Rolfe *v.* Rolfe, 15 Sim. 89.

(*f*) Bryson *v.* Whitehead, 1 Simons & S. 74.

(*g*) See Coslake *v.* Till, 1 Russ. 378.

(*h*) Baxter *v.* Connolly, 1 Jacob & W. 576; Coslake *v.* Till, 1 Russ. 376, 378. For a like reason, an agreement for the sale of the business of an attorney cannot be enforced. Bozon *v.* Farlow, 1 Meriv. 459.

(*i*) Furnival *v.* Crew, 3 Atk. 83; Iggulden *v.* May, 9 Ves. 325; Tritton *v.* Foote, 2 Bro. Ch. 636. *In re* Doolan, 3 Drury & W. 442. See Whitlock *v.* Duffield, Hoffm. Ch. 110. A license to be exercised upon land may be specifically enforced. Nelson *v.* Bridges, 1 Jur. 753. As to covenants for perpetual renewal, see City of London *v.* Mitford, 14 Ves. 41; Bayley *v.* Leominster, 3 Bro. Ch. 529; Evans *v.* Walshe, 2 Sch. & L. 519; Hackett *v.* McNamara, Lloyd & G. *temp.* Plunket, 283; Sheppard *v.* Doolan, 3 Drury & W. 1; Moore *v.* Foley, 6 Ves. 237; Brown *v.* Tighe, 8 Bligh, N. S. 272; Carr *v.* Ellison, 20 Wend. 178.

(*j*) Wilkinson *v.* Torkington, 2 Younge & C., Ex. 726, an instructive case.

(*k*) Withy *v.* Cottle, 1 Simons & S. 174. And see Pritchard *v.* Ovey, 1 Jacob & W. 396, where specific performance was decreed of an agreement for the sale of an annuity to be charged on certain lands of the defendant.

(*l*) Adderley *v.* Dixon, 1 Simons & S. 607. The Vice-Chancellor's decree seems to have proceeded on the ground of the uncertainty of the dividends which might become payable from the estate of the bankrupt. "Damages at law," he said, "cannot accurately represent the value of the future dividends; and to compel this *purchaser* to take such damages, would be to compel him to sell these dividends at a conjectural price. It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to

the case of a contract, that all the property of a grantor of an annuity, which he should obtain by will or otherwise, at the death of a third person, during the life of an annuitant, should be charged with the payment of the annuity, and the grantor becoming bankrupt, and the third party having died and left an annuity of larger value in trust for him, this annuity was charged with the payment of the annuity he had granted. (*m*) Equity has also enforced a contract to keep the banks of a river in repair, (*n*) a contract to pay the plaintiff a certain annual sum, and another sum for every hundred-weight of wire which the defendant should make in the lifetime of the plaintiff; (*o*) a contract for the sale of a life annuity, (*p*) and for the sale of shares in a public company. (*q*)

In regard to the sale of stock, as it is called, meaning very generally in the English cases only government stocks, but with us covering shares in companies generally, there is some uncertainty. It has been understood to be the prevailing rule in England, that such bargains are not to be enforced by specific performance; on the ground that a certain quantity of stock is worth as much and no more, as any other equal quantity of stock, and if the defendant be sued at law and the plaintiff recover damages, the value of the stock will be the measure of the damages, and the plaintiff may use the money so recovered in buying the stock. (*r*) There are, nevertheless, many cases in England, in which bargains for the sale and transfer of stock have been enforced. (*s*) The question has not arisen in this country

be paid for them. It has, however, been settled, by repeated decision, that the remedy in equity must be mutual; and that where a bill will lie for the purchaser, it will also lie for the vendor." 1 Simons & S. 612.

(*m*) Lyde *v.* Mynn, 1 Mylne & K. 683. "That the claim to the *annuity*," said Lord *Brougham*, Ch., "is barred by the bankrupt act cannot be denied; for the annuity was an interest of which the value was capable of calculation, and for which proof might have been made under the commission. But the covenant to secure that annuity, gave the annuitant a right which could not in any way be made the subject either of calculation or proof; and it seems impossible to understand how such a right could be barred." 1 Mylne & K. 692.

(*n*) Kilmorey *v.* Thackeray, cited Errington *v.* Aynesly, 2 Bro. Ch. 343; and see 2 Bro. Ch. 65.

(*o*) Ball *v.* Coggs, 1 Bro. P. C. 296.

(*p*) Pritchard *v.* Ovey, 1 Jacob & W. 396. And see Wellesley *v.* Wellesley, 4 Mylne & C. 554.

(*q*) Duncuft *v.* Albrecht, 12 Sim. 189. *Et vide infra.*

(*r*) Cud *v.* Rutter, 1 P. Wms. 570. Lord *Hardwicke*, Ch., Buxton *v.* Lister, 3 Atk. 383, 384. Lord *Eldon*, Ch., Nutbrown *v.* Thornton, 10 Ves. 161. Lord *Erskine*, Ch., Mason *v.* Armitage, 13 Ves 37.

(*s*) An agreement for sale of government stock and transfer of certificates,

so frequently or so directly as to enable us to lay down what may be called an American rule of law in relation to it. Perhaps, however, from the wider meaning of the word stock among us, and the greater complexity of the questions which occur in relation to the sale of it, we might expect a wider relaxation of the rule than in England, even if the rule itself be adopted. (*t*)

We are quite satisfied that the rule of England, in relation to the sale of stocks, does not rest, even there, on the difference between contracts about land and those about personalty, although this is sometimes referred to in their cases. The true reason is that above mentioned. And the exceptions to the rule do, for the most part, illustrate this reason, because, where a contract for the sale of stock is enforced, there is always some peculiar fact or agreement tending to show that it is not a mere matter of price.

We apprehend that the true rule that governs, or should govern these cases, is one which has a much wider application in the law of specific performance. We suppose it may be thus expressed. If the bargain be such, that when the defendant has paid his legal damages (which equity, generally, at least, supposes that he will pay), the plaintiff is fully compensated, and by using the money he gets, may secure to himself all the benefit he had a right to expect from the bargain, the court will leave him to these damages; but if it appears to the court, that after the plaintiff should recover and receive these damages, and use them as well as he could to supply the breach of the contract, he would remain uncompensated, because a

was executed in equity. Doloret *v.* Rothschild, 1 Sim. & S. 590. And it has been held, that an agreement for the transfer of railway shares may be enforced. Duncuft *v.* Albrecht, 12 Sim. 189, 199, where *Shadwell*, V. C., distinguished between three per cents., or other stock of that kind (which could always be had by any persons chosing to apply for it in the market), and railway shares of a particular description, which are limited in number, and not always to be found in the market. A vendor of railway shares, who has been paid the purchase-money, may enforce specific performance of the contract, in order that the purchaser, by accepting a legal transfer, may be fixed with the liability for calls, and he himself be exonerated. Shaw *v.* Fisher, 2 De G. & S. 310; Wynne *v.* Price, id. 310. Agreement between partners, upon a dissolution of the firm, that one of them should have the exclusive property of certain partnership books, was held proper for specific performance. Lingen *v.* Simpson, 1 Sim. & S. 600.

(*t*) See Mechanics Bank of Alexandria *v.* Seton, 1 Pet. 305.

substantial part of the advantage he hoped to receive from the bargain would be lost to him, here equity will interfere and enforce a specific performance. For example, if we suppose a person to own ninety shares of a certain stock, and if he can own one hundred he will possess some valuable privilege which he now does not possess, and for this purpose contracts to buy ten with the only person who has them for sale, and the other party, discovering his need, refuses to sell as he agreed to, and demands an extravagant price, we should confidently expect — providing of course that the conduct and purpose of the plaintiff were unexceptionable — that a court of equity would decree specific performance. It is quite common for owners of stock to need more in order to obtain a majority of votes. In most cases of this kind, a very strong objection against the prayer, would arise from the obvious impolicy of permitting or rather requiring sales for such purposes; but if this objection were removed, by the circumstances and the objects of the plaintiff, we might put this among the cases for a decree for specific performance.

Another very nice distinction has been taken, between a contract to build a house and one to repair a house. Thus, it is said, that one party can repair a house as well as another; and the plaintiff may be supposed to insist that the defendant and he alone should make the repairs, only because he has bargained to do it for less than another man would do it, and less than it should be done for. But a contract to build a house is quite a different thing. Here a man selects a builder for special and personal reasons, and has a right to insist that this very man shall build him a house, in order that it may have the qualities he expects. (*u*) But it is quite obvious, that while there may be

(*u*) 1 Fonbl. Eq. (5th ed.) 355, note (*r*). Sir *William Grant*, Flint *v.* Brandon, 8 Ves. 164; Lucas *v.* Comerford, 1 Ves. Jr. 235, where Lord *Thurlow* refused to compel specific performance of a covenant to rebuild in a lease. Pembroke *v.* Thorpe, 3 Swanst. 437, n.; where an agreement to build a house was enforced in a case of partial performance. Birchett *v.* Bolling, 5 Munf. 442. In Mosely *v.* Virgin, 3 Ves. 184, Lord *Loughborough* took the reasonable distinction, that if the contract expressed distinctly what sort of house was agreed to be built, so that the court could describe it as a subject for the report of the Master, specific performance might be decreed, but if the descripton in the contract was loose and undefined, the court would not assume to reduce it to certainty, and the party must be left to his remedy in damages. That contracts to *repair* will not, in general at least, be

a general foundation for such a distinction as this, it must often be unreal or inapplicable. If repairs are extensive, it is about as important that they be done well as that a house be built in a certain way. And on the other hand, very many houses are built precisely as merchandise is bought, and for the same purpose. Upon the whole, therefore, we should say, that if the contract were for building a house, there might be some presumption in favor of the applicant for specific performance; and if it were only for repairs, there would be a much less presumption for him, or none at all. Still, the controlling question in both cases would be, can the court see any peculiar circumstances, giving a peculiar reason for considering, that the applicant would not be adequately compensated by the damages he would recover at law? It is undoubtedly competent for a court of equity to enforce the specific performance of a contract by a defendant to do defined work upon his soil, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. (*v*)

A contract in relation to land may not be enforceable in equity, for the same reason which prevents most contracts about chattels from enforcement. If an agreement to give to

enforced specifically, appears from Hill *v.* Barclay, 16 Ves. 402; Raynor *v.* Stone, 2 Eden, 128. Compare Sanders *v.* Pope, 12 Ves. 282, and Davis *v.* West, 12 id. 475, per Lord *Erskine*, Ch. See an instance of the enforcement of a covenant to repair, in Kempe *v* Fitchie, 7 & 8 Eliz. 340. Even admitting the principle, that ordinarily an agreement to repair ought not itself to be specifically executed, the Court of Chancery will decree specific performance of agreements for the execution of leases containing covenants to repair. Paxton *v.* Newton, 2 Smale & G. 437. Yet, where the defendants contracted to perform certain work, and, as a part of the same agreement, promised to give a bond conditioned for the performance of their undertaking, inasmuch as the main agreement was not of such a character that a court of equity would compel its specific performance, the court also refused to compel the execution of the bond. South Wales Railway Co. *v.* Wythes, 1 Kay & J. 186, 31 Eng. L. & Eq. 226, by the Lords Justices.

(*v*) Storer *v.* Great Western Railway Co. 2 Younge & C., Ch. 53. That was where a railway company had purchased land running through a gentleman's pleasure-grounds, under a contract, one of the terms of which was the construction by the company of an archway under their road, and connecting one side of the pleasure-grounds with the other; and the construction of the archway was compelled. See also, Stuyvesant *v.* Mayor of New York, 11 Paige, 414. Where B consented to A's making a watercourse through his land, upon being paid a reasonable compensation, and no sum was agreed upon, but A made the watercourse, and enjoyed nine years' use of it, B was enjoined from obstructing it, and a reference was made to the Master to settle a proper compensation. Devonshire *v.* Eglin, 14 Beav. 530. And see Sanderson *v.* Cockermouth and Workington Railway Co. 11 id. 497.

certain fields a peculiar cultivation, would, when broken, give rise to a claim for damages which might be expended in producing the same result, then equity would not interfere.

It is common for equity to enforce by injunction the usual covenants of leases; (*w*) as, that manure or crops shall be left on the land, (*x*) or, that a meadow shall not be ploughed, (*y*) or gravel or any minerals dug. (*z*) And a contract to leave a certain amount of stock upon premises leased as alum works, was specifically enforced. (*a*) And, generally, it may be said, that where a lessee covenants that the demised premises shall be used in a particular way or for a particular purpose, equity will restrain him to that use or purpose. (*b*)

Equity also enforces contracts in relation to personalty, when the effect of the breach cannot be known or estimated with any exactness, either because the effect will show itself only after a long time, or for any other reason. (*c*) As where a con-

(*w*) Not, indeed, by virtue of the doctrine of specific performance, but in the exercise of the special jurisdiction of the court to prevent, by injunction, the breach of a *negative covenant.* "Beyond all doubt," said Lord *St. Leonards*, Ch., "where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will leave it entirely to a court of law to measure the damages; though, with respect to the negative covenants, if the tenant, for example, has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done." Lumley *v.* Wagner, 1 De G., M. & G. 617, 618. But, from this remark, one class of affirmative covenants is, it seems, to be excepted; for agreements by tenants to surrender their estates to their landlords upon a certain event may not only be enforced, but have a particular claim upon a court of equity. And Lord *St. Leonards* himself (when Lord Chancellor of Ireland), with respect to a case of this nature, said: "It requires a very strong case to justify the court in refusing to grant the relief sought in this case; for if there be one case in which specific performance ought to be decreed more than in another, it is where a party agrees to surrender a given estate to his landlord." Crocker *v.* Orpen, 3 Jones & La T. 601.

(*x*) Pulteney *v.* Shelton, 5 Ves. 147, 261, n.; Onslow *v.* ———, 16 id. 173.

(*y*) Pulteney *v.* Shelton, *ubi supra;* Lord Gray De Wilton *v.* Saxon, 6 Ves. 106. So of pasture-land. Drury *v.* Molins, id. 328.

(*z*) City of London *v.* Pugh, 3 Bro. P. C. 374; Thomas *v.* Jones, 1 Younge & C., Ch. 510.

(*a*) Ward *v.* Buckingham, cited Nutbrown *v.* Thornton, 10 Ves. 161.

(*b*) Steward *v.* Winters, 4 Sandf. Ch. 587. So with one who came in under, or with the consent of, the lessee. Howard *v.* Ellis, 4 Sandf. 369. And see Kimpton *v.* Eve, 2 Ves. & B. 349. The breach of a covenant not to burn the demised land was enjoined; notwithstanding there was a penalty of £10 per acre, provided in the lease, which the defendant was willing to pay. French *v.* Macale, 2 Drury & W. 269.

(*c*) Buxton *v.* Lister, 3 Atk. 383; Adderley *v.* Dixon, 1 Sim. & S. 607.

tract was made for the sale of many tons of iron, to be paid for by instalments, running through many years, and it was impossible to say what the profit of the purchase would be; (*d*) so, if a ship-carpenter should bargain for the sale to him of ship-timber, situated with peculiar convenience to his purposes. (*e*)

In much the larger number of cases in which this relief is sought in equity, the sale, conveyance, or transfer of something has been promised. But equity will also enforce promises for mere personal acts, especially if they are connected with a transfer or change of property, as a promise to indorse a note which has been transferred, (*f*) or to renew a lease, (*g*) or to charge an annuity on a certain estate; (*h*) or to invest money in lands for the purpose of a particular settlement; (*i*) or contracts made with a third party for the benefit of slaves, or an assignment of them. (*j*) An agreement to insure may be specifically executed in equity; and the bill may be filed after a loss has occurred. (*k*)

It may be added, that equity gives relief when a contract refers only to chattels, if circumstances give to them a value altogether beyond their price or money worth — a *pretium affectionis* — which the plaintiff may rationally subscribe to them, so

(*d*) Taylor *v.* Neville, cited 3 Atk. 384.

(*e*) Lord *Hardwicke*, Ch., Buxton *v.* Lister, 3 Atk. 385.

(*f*) See Watkins *v.* Maule, 2 Jacob & W. 242.

(*g*) *Vide ante*, p. 367.

(*h*) *Vide ante*, p. 368; Pritchard *v.* Ovey, 1 Jacob & W. 396.

(*i*) Kettleby *v.* Atwood, 1 Vern. 298, 471; Fothergill *v.* Fothergill, 1 Eq. Cas. Ab. 222.

(*j*) With respect to contracts for the assignment of slaves, see Williams *v.* Howard, 3 Murph. 74; per *Taylor*, C. J., and *Henderson*, J., Alexander, *v.* Ghiselin, 5 Gill, 138 (which, however, was an agreement for an assignment of negroes by way of security for a debt). Bryan *v.* Robert, 1 Strobh. Eq. 334; Sarter *v.* Gordon, 2 Hill (S. C.), 121. (Compare Young *v.* Burton, 1 McMullan, Eq. 255); Savery *v.* Spence, 13 Ala. 561; Caldwell *v.* Myers, Hardin, 551. See also, Murphy *v.* Clark, 1 S. & M. 221; Butler *v.* Hicks, 11 id. 78; Dudley *v.* Mallery, 4 Ga. 52. If a master, for consideration received, agree with a third person to manumit his slave, the agreement may be specifically executed in equity, upon the application of such third person. Thompson *v.* Wilmot, 1 Bibb, 422; though not upon a bill filed by the slave himself. Gatliff *v.* Rose, 8 B. Mon. 629. See Tom *v.* Daily, 4 Hamm. (Ohio), 368; Peters *v.* Van Lear, 4 Gill, 249.

(*k*) Perkins *v.* Washington Ins. Co. 4 Cowen, 645; Lord *Denman*, C. J., Mead *v.* Davidson, 3 A. & E. 308; Carpenter *v.* Mutual Ins. Co. 4 Sandf. Ch. 408. And, after a loss, a court of equity, taking jurisdiction for the purpose of giving a specific performance of the agreement to insure, is not bound to stop by decreeing the execution of a policy, but, without turning the plaintiff over to an action at law upon it, may give him full relief. Tayloe *v.* Merchants Fire Ins. Co. 9 How. 405.

far as he is concerned. (*l*) Or where personal property is detained in breach of trust. (*m*) And where a dispute relates to many articles, and for some the plaintiff may be compensated in damages, and for others not, equity will enforce specific performance as to all. (*n*) Nor is it a ground of demurrer to a bill, that it seeks specific performance of a contract which relates to personalty. (*o*)

It makes but little difference in the jurisdiction which equity takes, or in the relief it gives, whether the promise be positive or negative. But, technically speaking, equity decrees specific performance when the promise is positive, and injunction when it is negative. (*p*) It is obvious, that many promises may be in either form equally valid and effective. Thus, a promise already

(*l*) Pusey *v.* Pusey, 1 Vern. 273; Fells *v.* Read, 3 Ves. 70; Macclesfield *v.* Davis, 3 Ves. & B. 16; Lowther *v.* Lowther, 13 Ves. 95.

(*m*) Pooley *v.* Budd, 14 Beav. 34; McGowin *v.* Remington, 12 Penn. St. 56; Cowles *v.* Whitman, 10 Conn. 121; Mechanics Bank of Alexandria *v.* Seton, 1 Pet. 299, 305.

(*n*) McGowin *v.* Remington, 12 Penn. St. 56.

(*o*) Carpenter *v.* Mutual Safety Ins. Co. 4 Sandf. Ch. 408.

(*p*) There are cases where a contract to do something, and the correlative contract to refrain from doing some inconsistent thing, are not the converse of one another, and where, in other words, the performance of the negative part of the agreement is not of itself the performance of the positive part. In such a case, although the nature of the act to be done is such that a specific performance of it cannot be compelled, the court may still do what it can towards compelling men to the fulfilment of their engagements, by enjoining the party from violation of the negative part of the contract. Rolfe *v.* Rolfe, 15 Sim. 88. The court will not indeed use the power of injunction for the purpose of indirectly accomplishing that which it is unable to effect by the direct exercise of its jurisdiction to decree specific performance; yet where there is contained in the contract a promise to refrain from doing some particular thing, affording, therefore, of itself a proper case for an injunction, an injunction will be granted; and all the more willingly, if the final consequences will probably be the performance of the whole agreement, including as well those affirmative parts, which from their nature cannot be directly enforced, as that negative promise which is the legitimate ground for the injunction. A very recent and instructive case of this kind is Lumley *v.* Wagner, 1 De G., M. & G. 604, 13 Eng. L. & Eq. 252, where Mademoiselle Wagner had agreed with Mr. Lumley to sing at his theatre for three months, and during that time not to sing elsewhere; Lord *St. Leonards*, Ch. (affirming the decision of *Parker*, V. C.), enjoined her from violating the negative stipulation not to sing at any other theatre, though he could not compel her to sing at the plaintiff's theatre. The opinion of the Lord Chancellor contains an elaborate review of the conflicting cases upon this important subject, and is worthy of particular attention. Lumley *v.* Wagner was recognized in Johnson *v.* Shrewsbury & Birmingham R. Co. 3 De G., M. & G. 927, 932. Hamblin *v.* Dinneford, 2 Edw. 529 is *contra*, but was decided when the course of English decision was different from what it now is. Where the injunction prayed is only ancillary to the enforcement of the contract, the court will not grant it, if the contract is not one which is capable of specific execution. Baldwin *v.* Society for diffusing Useful Knowledge, 9 Sim. 393; Gurley *v.* Hiteshue, 5 Gill, 217. And see South Wales Railway Co. *v.* Wythes, 1 Kay & J. 186, 31 Eng. L. & Eq. 226.

referred to, to leave manure on a farm, may just as well be a promise not to take it away; and equity would relieve in one case as well as in the other. A covenant in restraint of trade, so called, that is, not to carry on a certain business, for a certain time, in a certain place, will, if in itself just and reasonable, be enforced by injunction, (*q*) so will a covenant not to build on land contiguous to the plaintiff, and to his detriment, (*r*) or not to erect or use dangerous or annoying buildings or machinery near him, (*s*) or that buildings on certain land, shall conform in reasonable particulars with those on the land of the promisee; (*t*) or that trees, which are peculiarly ornamental or convenient to the plaintiff, shall not be cut down by the defendant, on whose land they grow. (*u*) And a court of equity has jurisdiction to grant a specific performance of an agreement for the purchase of a copyright. (*v*)

Before leaving contracts for personal acts, or relating to chattels, it may not be useless to remark, that the Supreme Court of the United States appears to be less disposed than the courts of England to regard the distinction between contracts which relate to realty and those which refer only to personalty. (*w*) Indeed, throughout this country, there seems to be a strong tendency to subordinate this distinction, and all the more technical rules which have been enunciated in reference to this subject, to the general question, whether the plaintiff is in justice

(*q*) Rolfe *v.* Rolfe, 15 Sim. 88; *Shadwell*, V. C., Kemble *v.* Kean, 6 Sim. 335; Lord *St. Leonards*, Ch., 1 De G., M. & G. 631.

(*r*) Rankin *v.* Huskisson, 4 Sim. 13. See Squire *v.* Campbell, 1 Mylne & C. 459; Roper *v.* Williams, Turner & R. 18.

(*s*) Barrow *v.* Richard, 8 Paige, 351. An injunction was granted to restrain church-wardens from ringing a bell at an early hour in the morning, which they had agreed with the plaintiff, for a valuable consideration, to refrain from doing. Martin *v.* Nutkin, 2 P. Wms. 266. See Soltau *v.* De Held, 2 Sim. N. S. 183, 9 Eng. L. & Eq. 104.

(*t*) Franklyn *v.* Tuton, 5 Madd. 469, where a lessee, who had not complied with his covenant, that houses erected by him on the demised land should correspond in elevation with the adjoining houses, was required to alter the elevation and perform the covenant.

(*u*) And see Briggs *v.* Earl of Oxford, 5 De G. & S. 156, 8 Eng. L. & Eq. 194, and s. c. on appeal, 1 De G., M. & G. 363, 11 Eng. L. & Eq. 265.

(*v*) Thombleson *v.* Black, 1 Jur. 198 Lord *Langdale*, M. R., there said, that wherever a copyright formed a part of the subject-matter in respect of which relief was sought, a court of equity had jurisdiction, even though other matters might be mixed up with it. And see Sims *v* Marryat, 17 Q. B. 281, 7 Eng. L. & Eq 330.

(*w*) Barr *v.* Lapsley, 1 Wheat. 151, Mechanics Bank of Alexandria *v.* Seton, 1 Pet. 299; 2 Story, Eq. Jur. § 724. See Clarke *v.* Flint, 22 Pick. 238, per *Wilde*, J.

and equity entitled to other and better relief than the law can give him. (*x*) In those of our States in which an equity jurisdiction was slowly and reluctantly admitted, among the earliest instances of equity power given to the courts, after that of relieving in mortgages, was that of specific performance. And frequently, if not always, it is "the specific performance of *any* written contract," without reference to its subject-matter.

SECTION IV.

OF CONTRACTS RELATING TO THE CONVEYANCE OF LAND.

It is in relation to contracts for the sale and conveyance of land, (*y*) that the equity relief of specific performance is most freely admitted, most frequently practised, and most distinctly defined. (*z*) Nor does equity refuse to decree respecting land

(*x*) Among other cases, see Phillips *v.* Berger, 2 Barb. 608, 8 id. 627.

(*y*) Lord *Redesdale* gave an admirable and very authoritative exposition of the general principles governing the interposition of a court of equity to enforce contracts for the conveyance of land, in his judgment in Lennon *v.* Napper, 2 Sch. & L. 684. It seems to have been held, in a recent case, that a contract for the purchase of land ought not to be executed in equity, where the agreement contemplates another remedy, by providing, that upon default of the purchaser, the land may be resold at his risk and expense. Bodine *v.* Glading, 21 Penn. State, 50. *Sed quære.* And it has been said, that equity will generally interfere less readily in behalf of a vendor than of a vendee; because the former can get a more complete remedy at law than the other. Lord *Cranworth,* L. J., Webb *v.* Direct London and Portsmouth Ry. Co. 1 De G., M. & G. 528, 529. But compare the opinion of *Knight Bruce,* L. J., in the same case. For certain contracts concerning the use of land, but not going to the creation or transfer of an estate therein, see the next preceding section.

(*z*) And a court of equity will sometimes entertain a bill, the object of which is to *remove an obstacle* lying in the way of a present application for a specific performance of a contract for the sale of land. Thus, where it was part of the agreement that the price should be ascertained by the valuation of certain referees, and the vendor refused to permit them to come upon the land, it was held, that the vendor should be compelled to permit the valuation, and that when the valuation was made, the vendee might file a supplemental bill for a specific performance. Morse *v.* Merest, 6 Madd. 26, a case which has been often approved; though the inclination of Lord *Eldon's* mind was, that a vendor should not be compelled to execute an *arbitration bond* in order that an award might be made according to agreement, fixing the price of land purchased by the plaintiff, inasmuch as it was uncertain whether, after all, any award would ever be made. Wilks *v.* Davis, 3 Meriv. 507. But the court will not undertake to see to the doing of a preliminary act, the due and exact performance of which it has not the power to control. Therefore it will not decree specific performance of an agreement to name arbitrators to fix the amount of the purchase-money of land agreed to be sold. Agar *v.* Macklew, 2 Sim. & S. 418; Milnes *v.* Gery, 14 Ves.

in a foreign country, provided the parties are resident within their jurisdiction, and there is nothing which must prevent the court from compelling them to execute their agreement. (*a*) But in decreeing a specific performance of a parol contract for the sale of lands, courts always require the complainant to do complete justice, upon the broadest principles of equity, and will not be satisfied with a literal performance of the agreement by him. (*b*)

The first question which presents itself in reference to contracts for the conveyance of land, is in relation to the title; for defect of title is a very common defence. It is a general rule, that any party who objects to title, and asks to have inquiry made as to its sufficiency, may have that inquiry, (*c*) unless the

400; Blundell *v.* Brettargh, 17 Ves. 232. See Cheslyn *v.* Dalby, 2 Younge & C., Ex. 170. Yet where an award, declaring the price has been actually given, a court of equity will enforce compliance with it. "That a bill," said Lord *Eldon*, Wood *v.* Griffith, 1 Swanst. 54, "will lie for the specific performance of an award, is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement, ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape." See also, Bouck *v.* Wilber, 4 Johns. Ch. 405; Penniman *v.* Rodman, 13 Met. 382; Jones *v.* Boston Mill Corporation, 4 Pick. 507. And after an agreement to sell, at a price to be fixed by arbitration, has been executed to the extent of appointing the arbitrators, it is not competent to either party at his pleasure entirely to undo what has been done; for a revocation of the authority of the appraisers or arbitrators, though good at law, may be bad in equity, in which case the arbitrators may go on in disregard of such revocation, and a court of equity will respect their award, and perhaps enforce it. Lord *Eldon*, Ch., Harcourt *v.* Ramsbottom, 1 Jacob & W. 505, 508; Cooth *v.* Jackson, 6 Ves. 12, 41; Belchier *v.* Reynolds, 2 Kenyon, Pt. 2, 87, where a specific performance was decreed according to a valuation made after the *death* of the vendor. See also, Pope *v.* Duncannon, 9 Sim. 177; Cheslyn *v.* Dalby, 2 Younge & C., Ex. 197; Dimsdale *v.* Robertson, 7 Irish Eq. 554, 2 Jones & La T. 58. If an award appear to have been made upon a ground which is not sustainable, or if the arbitrators have misconducted themselves in making it, specific performance will not be decreed. Chichester *v.* M'Intire, 4 Bligh, N. S. 78. See Sugd. Law of Prop. 74 (in Law Lib. Vol. 65).

(*a*) Penn *v.* Lord Baltimore, 1 Ves. Sen. 444; Lord Cranstown *v.* Johnston, 3 Ves. 182. *Marshall*, C. J., Massie *v.* Watts, 6 Cranch, 158–161; Watts *v.* Waddle, 6 Pet. 389; Watkins *v.* Holman, 16 Pet. 25; White *v.* White, 7 Gill & J. 208; Stansbury *v.* Fringer, 11 id. 149. Where the defendant was the infant daughter and heir of the vendor, domiciled within the jurisdiction of the court, though the land was situated in another State, *Walworth*, Ch., granted a decree which directed a conveyance by the infant, when she arrived at proper age, to enable her to transfer the legal title according to the law of the State where the land was; and authorized the plaintiff, meanwhile, to take and retain possession of the land, if he could obtain possession thereof without suit; and a perpetual injunction was granted, restraining the defendant from disturbing the complainant in such possession, or from doing any act whereby the title should be transferred to any other person, or in any way impaired or incumbered. Sutphen *v.* Fowler, 9 Paige, 280.

(*b*) Hull *v.* Peer, 27 Ill. 312.

(*c*) As to the distinction between the case where the apparent defect in the vendor's title is such an one as may be expected to be removed upon a reference consistently with the equity practice; and

court can see that the objections are clearly frivolous, or are intended only to delay and embarrass the plaintiff. (*d*) Certainly no court would compel a party to take and pay for an estate of which only a substantially imperfect title could be given. (*e*) It is, however, quite impossible to say, by a definite rule or standard, *how* good a title must be to satisfy a court of equity. (*f*)

On the one hand, no reasonable court would require, that a title should be so technically perfect, that no acute conveyancer could find a recondite and merely formal objection upon which the possibility of a doubt might rest. (*g*) In one sense, this would be an imperfection. But it would not be such an imperfection as should induce a court to refuse a decree for performance. On the other hand, if the character of the title were

that where the court will not allow the plaintiff to make up a case in this way, but will only dismiss his bill without prejudice to a new bill, see Clay *v.* Rufford, 5 De G. & S. 768, 19 Eng. L. & Eq. 350.

(*d*) The right of the purchaser, in a suit against him for specific performance, to have the vendor's title proved, may be waived by acts *in pais*. As to what acts will be sufficient evidence of a waiver, see Simpson *v.* Sadd, 4 De G., M. & G. 665, 31 Eng. L. & Eq. 385; Fleetwood *v.* Green, 15 Ves. 594. But it has been held, that a vendor cannot have the benefit of such waiver, unless the fact of waiver is expressly put in issue in the bill; it is not sufficient that facts are stated upon the bill amounting to evidence of waiver, but the fact of waiver must be directly alleged. Clive *v.* Beaumont, 1 De G. & S. 397; Gaston *v.* Frankum, 2 id. 561. If a purchaser apply for specific performance, and in his bill insist that the defendant cannot make a good title, the court cannot pass upon the title; for the plaintiff, by his own allegation of the defendant's want of title, shows that there cannot be that decree of specific performance which he seeks. Nicloson *v.* Wordsworth, 2 Swanst. 365. "When, on a bill by a vendee for specific performance, it appears that the defendant cannot make a good title, there is no further question in the cause than who is to pay the costs." Lord *Eldon*, 2 Swanst. 369. As to the costs of an issue ordered at the instance of the purchaser, and finally decided in favor of the vendor, see Grove *v.* Bastard, 1 De G., M. & G. 69.

(*e*) Blatchford *v.* Kirkpatrick, 6 Beav. 232. Even after the defendant has waived an inquiry into the title, if it come out collaterally that it is imperfect, the court will not compel him to accept it. Warren *v.* Richardson, Younge, 1. And see Deverell *v.* Bolton, 18 Ves. 514, where Lord *Eldon* held, that an approval of the title by counsel of the vendee, upon an abstract being laid before him, could not be taken as a conclusive waiver of reasonable objections to the title. But if the vendor stipulate expressly to convey only such title as he has, the vendee cannot take the objection that it is defective. Freme *v.* Wright, 4 Madd. 364. And see Ten Broeck *v.* Livingston, 1 Johns. Ch. 357; Winne *v.* Reynolds, 6 Paige, 407; McKay *v.* Carrington, 1 McLean, 50; Nicol *v.* Carr, 35 Penn. St. 381.

(*f*) But the vendor must show a *title*, not a *covenant* for title; and this whether the interest contracted for be freehold or leasehold. Fildes *v.* Hooker, 2 Meriv. 424; Purvis *v.* Rayer, 9 Price, 488, where the point was first settled, that the vendor of a leasehold estate must show the title of his lessor. And see Deverell *v.* Bolton, 18 Ves. 505.

(*g*) That the land is subject to a reservation of mines and minerals and water privileges, none of which, in point of fact, the land contains, has been held to constitute no valid ground of objection to the title. Winne *v.* Reynolds, 6 Paige, 407.

doubtful, although the court were able to come to the conclusion that, on the whole, a title could be made that would not probably be overthrown, this would not be good title enough; for the court would have no right to say that their conclusion, or their opinion, would bind the whole world, and prevent all assault upon the title. (*h*)

We know not what better we can say, than that every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying if not successful suits be brought against him, and possibly take from him or his representatives land upon which money was invested. He should have a title which shall enable him not only to hold his land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. (*i*)

In a late case it is intimated, that the adverse opinions of conveyancers and lawyers will not alone suffice to make a title deficient in the view of the court. (*j*) And this must certainly be true to the letter. For there can be nothing to prevent the court from going behind such opinions, and examining into the grounds of them. And, of course, if they are found to be dishonest, or merely frivolous, the court would disregard

(*h*) And that may be a good title at law, which a court of equity will not exercise its discretionary power to force upon a reluctant purchaser. Lord *Truro*, C., Grove *v.* Bastard, 1 De G., M. & G. 75. And Lord *Cottenham*, when the same case was before him, made some observations upon the delicate and responsible duty thrown upon the court, when it is required to decide, as between vendor and purchaser, a question of title which it cannot conclude as against the party from whom the adverse claim may be expected. 2 Phillips, 621. Compare Vancouver *v.* Bliss, 11 Ves. 465.

(*i*) The principles upon which a court of equity determines whether a title is such as a purchaser must be required to take, were much considered in Pyrke *v.* Waddingham, 10 Hare, 1, 17 Eng. L. & Eq. 534. See also, Freer *v.* Hesse, 4 De G., M. & G. 495, 21 Eng. L. & Eq. 82; Collard *v.* Sampson, 4 De G., M. & G. 224, 21 Eng. L. & Eq. 352. And upon this subject (which is much too extensive to be here treated of in detail), the 3d section [on *Doubtful Titles*], and the 4th section [containing *Examples of Bad, Good, and Doubtful Titles in Equity*], of 1 Sugd. Vend. & Purch. c. 10, Am. ed. 1851, may be consulted with advantage. See also, Owings *v.* Baldwin, 8 Gill, 337; Vancouver *v.* Bliss, 11 Ves. 458; Garnett *v.* Macon, 2 Brock. 244. An unfavorable decision in the inferior court does not render the title doubtful; and, on appeal, the judge of the Superior Court is still bound to exercise his own discretion, and decide according to his own judgment. Sheppard *v.* Doolan, 3 Drury & W. 8. For statement of the general rule, see Luckett *v.* Williamson, 31 Mo. 54.

(*j*) Dalzell *v.* Crawford, 1 Pars. Eq. 57.

them. But this, although a possible, is hardly a supposable case. And it must be true always, that the deliberate, adverse opinion of one or more persons known to be largely employed in the investigation of titles, and believed to have competent skill and knowledge, must be regarded as going very far indeed against a title, because, if it did nothing else, it could hardly fail to lessen the marketable value of the land. (*k*)

Sometimes an objection to title may be a valid one, but capable of ready and entire removal; as a charge or incumbrance which can be paid off, and which the plaintiff is ready to pay off; or releases or grants are wanted from persons who are ready to give them, if required to complete a title. In such cases it would seem inconsistent with the purpose and character of a court of equity to refuse a decree of performance, if the vendor is able to make a good title at any time before the decree is pronounced. (*l*) We do not say that it should be enough if the plaintiff can make it certain before a decree is made that

(*k*) We say this, although Lord *Eldon*, in Boehm *v.* Wood, 1 Jacob & W. 422, declared that the doubts of conveyancers, whether the title was good or not, amounted to nothing unless the court, by its own observation, perceived in the abstract of the title a reasonable ground for refusing to compel a purchaser to take it. *Vide supra*, note (*i*).

(*l*) Upon a bill filed by a vendor it is generally sufficient if he can show a good title at the hearing, although he had not a good title at the time of the contract; for, if the defendant wished to take advantage of the want of title, he should have received the contract on that ground while the defect existed. Hoggart *v.* Scott, 1 Russ. & M. 293; 2 Dan. Ch. Pr. (Boston, 1846), 1195; Salisbury *v.* Hatcher, 2 Younge & C., Ch. 54. The plaintiff may make a good title if he can, when the cause comes on upon further directions, though he could not do so when the title was examined previously by the Master; in such case, however, the defendant may be relieved from costs. Paton *v.* Rogers, 6 Madd. 256. See 2 Dan. Ch. Pr. 1196 (Boston, 1846). But Lord *Eldon*, in Lechmere *v.* Brasier, 2 Jacob & W. 289, said, that he would not extend the rule, which the court had adopted, of compelling a purchaser to take the estate, where a title was not made till after the contract, to any case to which it had not already been applied; and that the rule had, in many cases, been productive of great hardship. And in that case the purchaser of real estate sold under a decree, was discharged from his purchase for an error in the decree, although the parties were proceeding to rectify it. See also, Coster *v.* Turnor, 1 Russ. & M. 311; Wright *v.* Howard, 1 Sim. & S. 190, 205. And whether it is sufficient that the plaintiff can perform his part at the time of the decree, depends upon the circumstances of the particular case, and especially upon the question whether, if he could not have performed the contract originally, there has since been such a change of circumstances as renders it inequitable for him to insist now upon a specific performance. *Marshall*, C. J., Garnett *v.* Macon, 2 Brock. 212. While it is competent to the plaintiff to *perfect* his title in the progress of the cause, his right to force upon the defendant a *new* title, acquired since the filing of the bill, only exists under certain limitations; with respect to which, it is held, he may rely upon a title acquired in point of form after the bill is filed, provided that title is consistent with his original rights, and is one which can operate by relation back. Doyle *v.* Callow, 12 Irish Eq 241, 244.

the title will be made good afterwards; for, although he might in such a case ask for reasonable delay of the decree, that he may have the desired opportunity to complete the title, this is as much as he should have. (*m*)

It is for the buyer to object to the sufficiency of title. The seller cannot object unless the buyer demands warranty; for, if the buyer is willing to take the land with the best title he can get, and with it the risk of ouster, he should have it. (*n*) So if the seller can make good title to a part of the land, and to that only, the buyer may insist upon having that part, unless the seller is in no fault whatever, and would be materially injured by a severance of the land. (*o*)

(*m*) If the vendor was, in the first instance, guilty of an unfair concealment of the defect, a subsequent removal of it will not entitle him to relief. Dalby *v.* Pullen, 1 Russ. & M. 296. It has been held, that after an agreement for the sale of land has been performed by the execution of a conveyance by the vendor, who at the time had no title or right to convey, such vendor cannot, upon afterwards obtaining the title, insist on the vendee's acceptance of a new conveyance; nor will the court enjoin the vendee from prosecuting an action upon the covenants in the original deed instituted before the vendor's acquisition and tender of a good title. Tucker *v.* Clarke, 2 Sandf. Ch. 96. And see Davis *v.* Symonds, 1 Cox, C. C. 403.

(*n*) Milligan *v.* Cooke, 16 Ves. 1; Mestaer *v.* Gillespie, 11 id. 640; Jones *v.* Belt, 2 Gill, 106. Where a vendor, being defendant in the suit, excepted to a report of the master finding in favor of his title, the exception was overruled by Sir *John Romilly*, M. R., who declared it to be without precedent, and wrong in substance as well as form. Bradley *v.* Munton, 15 Beav. 460, 21 Eng. L. & Eq. 555. In Luckett *v.* Williamson, 31 Mo. 54, it is said, that where the vendor has not the complete title, the vendee may insist on having all that the vendor can convey, with compensation for the difference.

(*o*) Western *v.* Russell, 3 Ves. & B. 192; Hill *v.* Buckley, 17 Ves. 394; Jacobs *v.* Locke, 2 Ired. Eq. 286. In a case where it was contended that an intended lessee could not have a specific performance of the agreement to lease, on the ground that the intended lessor had not such an interest in the whole property as would have enabled him on his part to have obtained a specific execution of the contract, and that therefore there was a want of *mutuality*, it was answered: "The doctrine of this court, which is commonly expressed by saying, 'contracts must be mutual,' has no application to a case like this. A vendor cannot make a purchaser take an estate with a bad title; but the purchaser may compel the vendor to give him the estate with such title as he has." Sutherland *v.* Briggs, 1 Hare, 34, per *Wigram*, V. C. Where one of two tenants in common in fee of a colliery, contracted with the plaintiff for a lease of the entirety, the court refused to compel him to execute a lease of his moiety only. Price *v.* Griffith, 1 De G., M. & G. 80, 8 Eng. L. & Eq. 72. "Cases may be conceived," said *Knight Bruce*, L. J., in that case (Id. 84), "where a person who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee, for such part of the subject-matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery; and in this case there is no evidence of improper conduct or misrepresentation, or of the defendant Griffith having held himself out as capable of contracting for the whole, or, in fact, any other circumstance constituting a ground for a decree as to one undivided share alone." As to the considerations which impose greater caution upon courts in this country, in adjudging partial per-

A somewhat different question arises, or if it be the same it has a different aspect, when the parties have themselves agreed upon a time at which the title must be good, and shown to be so, and have made this time a part of the contract. (*p*) If that time has elapsed, there can be no specific performance of the contract; (*q*) and if the plaintiff asks for further time, and also for a purchase after this further time, he may be said to ask that the court should make a new bargain, and not to seek the enforcement of the bargain he had made for himself. There may be given, in answer to this, the rule in equity, that "time is not of the essence of a contract;" (*r*) but we think it would be wiser and safer to express what is really meant by this rule, by saying, that time is not *necessarily* of the essence of a contract. It certainly may be made so by the parties themselves, or by the circumstances of the case, although the parties say nothing about it. (*s*) Thus if a delay is asked by either party, and the

formance, where the inability of the vendor to give a good title to land prevents complete performance, see remarks of *Selden*, J., in Mills *v.* Voorhees, 20 N. Y. (6 Smith) 412.

(*p*) Time has been held to be of the essence of the contract, upon the construction of the agreement, in Seaton *v.* Mapp, 2 Coll. 556 (see Drysdale *v.* Mace, 5 De G., M. & G. 103, 27 Eng. L. & Eq. 195); Payne *v.* Banner, 7 Jur. 1051; Wells *v.* Smith, 7 Paige, 22.

(*q*) Lord *Eldon*, Ch., Boehm *v.* Wood, 1 Jacob & W. 420; Alley *v.* Deschamps, 13 Ves. 225. But even where time is of the essence of the contract, the defendant cannot take advantage of a delay of which his own misconduct was the cause. Morse *v.* Merest, 6 Madd. 26; Taylor *v.* Longworth, 14 Pet. 172; Pritchard *v.* Ovey, 1 Jacob & W. 396. And a stipulation, making a failure to pay purchase-money at the time agreed, a breach of the contract and a ground for its rescission, may be waived by an acceptance of the money subsequently. Hunter *v.* Daniel, 4 Hare, 420. Or by other acts of waiver. Reed *v.* Chambers, 6 Gill & J. 490.

(*r*) But the party who seeks to avail himself of this maxim, must have an equity which warrants his invoking it. A purchaser whose default has not been *bona fide*, has no equity to support an application for specific performance; and if it appear that he bought speculatively, without knowing, and without having probable grounds for believing, that he should be prepared with money to pay the price at the stipulated time, even a comparatively short delay may deprive him of the assistance of a court of equity. Gee *v.* Pearse, 2 De G. & S. 325. And see Alley *v.* Deschamps, 13 Ves. 228.

(*s*) A change of circumstances, subsequent to the making of the contract, may render a prompt fulfilment of it on the plaintiff's part a necessary condition to his right to relief. The doctrine of equity is thus stated by Chief Justice *Marshall:* "The rule that time is not of the essence of a contract has certainly been recognized in courts of equity; and there can be no doubt that a failure on the part of a purchaser or vendor to perform his contract on the stipulated day, does not of itself deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. It may be in the power of the court to direct compensation for the breach of contract in point of time, and in such case the object of the parties is effectuated by carrying it into execution. But the rule is not universal. Circumstances may be so changed, that the object of the parties can be no longer accomplished, that he who is injured by the failure of the other contracting party, can-

court give it, they never give an unlimited period, but name a day of reasonable distance, and refuse to go further. (*t*) This rule is invoked in a great variety of cases, and is applied in many of them. And language is sometimes used in respect to it, possibly a use is sometimes made of it, which is not easily reconciled with the just duties and powers of equity. We cannot doubt that the rule must needs be substantially this. The court will always inquire into the time when a thing is to be done, as they will into any other part of the contract. If the thing to be done — whether a conveyance of land or any thing else — can be as well done at a later time as an earlier, or the reverse, and certainly without detriment to the party called upon to do the thing, then time is not in fact of the essence of the contract, and will be regarded by the court, or rather disregarded, accordingly, provided the parties have not themselves expressly agreed that the time shall be treated as essential, or made it so by their conduct. But if it seems that the whole value, or a material part of the value of the transaction to the defendant, depends upon its being done at a certain time, and no other, or that the substitution of any other will subject him in any way to loss or material inconvenience, then time is certainly of the essence of the contract, so far as he is concerned, and the court will so regard it. (*u*) And in deciding the ques-

not be placed in the situation in which he would have stood had the contract been performed. Under such circumstances it would be iniquitous to decree a specific performance, and a court of equity will leave the parties to their remedy at law." Brashier *v.* Gratz, 6 Wheat. 533.

(*t*) Although time was not originally of the essence of the contract, yet, after considerable and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed; that time will then be considered as having become of the essence of the contract; and in case the party to whom notice has so been given, fails to do what is proper on his part, within the time so fixed, a court of equity will not afterwards interfere in his favor to compel the execution of the contract. Lord *Langdale*, M. R., King *v.* Wilson, 6 Beav. 126; *Turner*, L. J., Roberts *v.* Berry, 3 De G., M. & G. 292; Walker *v.* Jeffreys, 1 Hare, 348; Lord *St. Leonards*, 1 Sugd. V. & P. ch. 5, § 3, pl. 34, states the rule more narrowly. As to what is *reasonable* notice, see Parkin *v.* Thorold, 16 Beav. 59, 13 Eng. L. & Eq. 419, per *Romilly*, M. R. In Dominick *v.* Michael, 4 Sandf. 426, a right is asserted for either party to make the time essential by a mere demand of performance at the stipulated day.

(*u*) Brashier *v.* Gratz, 6 Wheat. 528, 533; Garnett *v.* Macon, 2 Brock. 246, 6 Call, 308. Where the subject-matter was the possession, trade, and good-will of a public-house, and the furniture and stock of liquors therein, time was held to be of the essence of the contract. Coslake *v.* Till, 1 Russ. 376. And such is the general rule where the property which is the subject of the contract is connected with trade. Walker *v.* Jeffreys, 1 Hare, 348 It seems where land is purchased as an

tion whether time be of the essence of the contract or not, a court of equity could hardly fail to consider, that the express agreement of the parties themselves upon a certain time, is strong, though not conclusive evidence, that it belonged to the essence of the contract. (*v*)

article of commerce, with a view to be sold again, the purchaser has a right to insist that a conveyance, at the stipulated time, is essential. McKay *v.* Carrington, 1 McLean, 59. In the sale of a reversion, time is of the essence of the contract. Newman *v.* Rogers, 4 Bro. Ch. 391; Spurrier *v.* Hancock, 4 Ves. 667. Where an incoming tenant agreed to procure a certain person to be his surety for the rent by a stipulated day, the time was held to be of the essence of the contract. Mitchell *v.* Wilson, 4 Edw. Ch. 697.

(*v*) Where a vendor, who had neglected to furnish an abstract of title at the day stipulated, sought to enforce the specific performance of the contract, contending that time was not of the essence of the contract, Lord *Cranworth*, V. C., before whom the bill was filed, denied that the words of a contract could have any different meaning in a court of equity from that which they bore in a court of law; or that a court of equity will ever, if there are no other circumstances in the case, disregard the plain letter of the contract, and compel the vendee to take a title on a day different from that on which he has contracted to take it. "When, therefore," said his lordship, "a contract has been entered into, by which a court of law decides that the purchaser is not bound unless a title be made before a given day, if a court of equity gives relief, it must be, not on the ground that it puts, on the words of the contract, a construction different from that put on it at law, but because there are grounds, collateral to the contract, on which it can found a jurisdiction warranting its interference. What, then, are those grounds? I answer, the conduct of the contracting parties. Though the terms of the agreement stipulate for the completion of the purchase on a given day; yet, if the parties have dealt together on the footing that the contract should be construed as a contract to complete in a reasonable time, this court acts on *that* as the real contract to be enforced. There is, no doubt, some difficulty in reconciling this, which is certainly the doctrine of the court, with the statute of frauds. A contract to purchase if a title is made on a given day, is not the same contract as a contract to purchase if a title is made in a reasonable time; and so, to admit parties, by agreement, not in writing (and conduct is but evidence of agreement), to substitute the latter for the former contract, is, in truth, to give effect to a contract relating to lands not reduced into writing and signed by the party to be charged; and this cannot be done consistently with the statute of frauds, as was decided by the Court of Common Pleas, in Stowell *v.* Robinson, 3 Bing. N. C. 928. Perhaps this court has acted on the ground that it would be a fraud in a purchaser, after dealing with a vendor on the footing that he did not consider the time fixed as material, to turn round and insist on the strict terms of the written contract; or it may be that the court has, from the conduct of the parties, felt itself warranted in inferring that the day named was intended only as a security for performance in a reasonable time; and so, has dealt with it as in the nature of a penalty. Be this, however, as it may, whatever be the foundation of the doctrine of the court, there is no doubt of its existence; that is, though the contract, according to its terms, is that the purchase shall be completed on a given day, and is so framed, that, if not completed on that day, the purchaser is, at law, entitled to recover back his deposit; yet, if the parties deal together on the footing of having disregarded the appointed day, as having, according to the ordinary language used, agreed to treat time as not being of the essence of the contract, then this court will give relief, although the day for completion may have passed. But this relief is, as I have already stated, given solely on the ground of such dealing of the parties." Parkin *v.* Thorold, 2 Sim. N. S. 7, 8; 11 Eng. L. & Eq. 275. "Whether the facts have in all cases," added Lord *Cranworth*, in the same opinion, "been such as fairly to warrant the inference relied on; whether this court has not sometimes made a new contract for the parties, and so enforced on the purchaser, the performance of what he never undertook to do, ...t the point

We said that time was not *necessarily* of the essence of the contract. But at this period, and in this country, it usually is so in fact. Very few transactions in business are isolated and independent. It is not often that one buys without making arrangements elsewhere for the purpose, or sells without having other things in view, and connected with this, by distinct bargain, or at least by a definite plan and expectation. In other words, it must be true here, in point of fact, that it is generally almost as material *when* a contract is carried into full effect, as *how* it is. It may not have been so formerly, and time may have had less value, and punctuality less merit. But we think that both the moral and judicial equity applicable to

for decision. It is sufficient to say, that the ground on which the court has professed to proceed, has always been that the parties have so acted as to enable it either to give to the original contract a meaning different from its *prima facie* obvious import, or else to say that the original contract, so far as relates to the time fixed for its completion, has been abandoned, and a new and more extended one has been by implication entered into." Applying those principles to the case before him, which came up on a motion to dissolve an injunction restraining an action at law for the recovery of the deposit, he *held*, that nothing appeared to warrant him in saying that the defendant ever abandoned his right to insist on the completion of the purchase at the specified day, and he decided in favor of the defendant accordingly. But the same case afterwards coming on for hearing before Sir *John Romilly*, M. R., that judge overruled the decision of Lord *Cranworth*, and affirmed the doctrine, that *prima facie*, in equity, time is not essential. Parkin *v.* Thorold, 16 Beav. 59, 13 Eng. L. & Eq. 416. And in a subsequent case of Roberts *v.* Berry, 3 De G., M. & G. 284, 17 Eng. L. & Eq. 400; presenting a similar state of facts, *Knight Bruce* and *Turner*, Lords Justices, adhered to the doctrine as laid down by the Master of the Rolls, in opposition to the opinion of Lord *Cranworth*, in Parkin *v.* Thorold. While, therefore, the weighty observations of Lord *Cranworth*, in the above-cited case, command attention as an argument for a reduction of the doctrine of equity upon this subject, to mere conformity to the common law, and in the same degree to a more reasonable and safe respect to the words of men's contracts, it must be conceded that the contrary view seems as yet to obtain in England. The doctrine of equity, as collected from the prevailing authorities, may perhaps be stated with tolerable accuracy, in the following propositions, namely, that time may appear to be of the essence of the contract, by implication from the circumstances specially surrounding the case, e. g. from the character of the property, — as where it is perishable, — or is wanted for some immediate purpose of trade or manufacture, — or where the vendor has a determinable interest only; that it may be made of the essence of the contract by express stipulation; but that, in the absence of such special circumstances or express stipulation, time is not essential; and that a provision in the contract that it is to be completed at a specified day, is not of itself such an express stipulation as in equity renders the time material. *Knight Bruce*, L. J., 3 DeG., M. & G. 290; *Turner*, L. J., id. 291, 292; *Romilly*, M. R., 13 Eng. L. & Eq. 418; Boehm *v.* Wood, 1 Jacob & W. 422; Walker *v.* Jeffreys, 1 Hare, 348. And see Molloy *v.* Egan, 7 Irish Eq 690; Reynolds *v.* Nelson, 6 Madd. 20, Popham *v.* Eyre, Lofft, 786, 814; Smedberg *v.* More, 26 Wend. 238; Hatch *v.* Cobb, 4 Johns. Ch. 559; Decamp *v.* Feay, 5 S. & R. 326. And the express stipulation making time essential need not be contained in the written contract. Nokes *v.* Killmorey, 1 De G. & S. 444, an instructive case upon this subject, which, however, cannot be conveniently abridged.

existing usages, will, for the most part, find *time* to be entitled to especial regard. (*w*)

SECTION V.

OF THE STATUTE OF FRAUDS.

A question has been much agitated and variously decided, in cases where specific performance was sought of contracts for the transfer of land, and indeed, of other contracts, as to the effect in equity, of the Statute of Frauds, upon such contracts. (*x*) It will be seen, in our chapter on that statute, that

(*w*) And *Sir James Knight Bruce*, one of those judges who adhere to the maxim, that in equity time is not of the essence of the contract, in one case had so sensibly before him the serious consequences of a disappointment in the receipt of the *purchase-money* at the appointed day, as to be reported as saying, "that a purchaser not ready with the price, according to his contract, ought, I think, to show *a very special case* for the interference of this court against the vendor." Gee *v.* Pearse, 2 De G. & S. 346. Now the injury resulting from a neglect on the part of the *vendor* to convey the title at the appointed day, though not perhaps so common, may be as real and as ruinous a consequence as that which is occasioned when the purchaser on his part fails to pay the money at the day. On the whole, however averse the court of equity may be to adopt the strictness of the common law, the general tendency of the modern decisions is, certainly, to confine the equitable remedy to cases where the parties applying for it have displayed a becoming promptness on their own part. Walker *v.* Jeffreys, 1 Hare, 348; Southcomb *v.* Bishop of Exeter, 6 Hare, 213. See Rogers *v.* Saunders, 16 Me. 92; Benedict *v.* Lynch, 1 Johns. Ch. 370.

(*x*) To comply with the statute, the whole contract must either be embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Subject to the rule just stated, oral evidence may be introduced to connect the two papers, but not to supply any part of the contract itself. Ridgway *v.* Wharton, 3 De G., M. & G. 677; Squire *v.* Campbell, 1 Mylne & C. 480; Clinan *v.* Cooke, 1 Sch. & L. 22. (Compare Forster *v.* Hale, 3 Ves. 696, 713 and note (2), by Hovenden); Hodges *v.* Horsfall, 1 Russ. & M. 116; Martin *v.* Pycroft, before Parker, V. C., 11 Eng. L. & Eq. 110; Moale *v.* Buchanan, 11 Gill & J. 322; Dorsey *v.* Wayman, 6 Gill, 59; Parrish *v.* Koons, 1 Pars. Eq. 79; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273; Madeira *v.* Hopkins, 12 B. Mon. 604. See Martin *v.* Pycroft, on appeal, 2 De G., M. & G. 785, 15 Eng. L. & Eq. 376. Though the case is of a nature capable of adequate remedy at law, yet if the Statute of Frauds stand in the way of relief at law, while there has been such a part performance as to exempt the case from the operation of the statute in equity, this is a motive for the court of equity to entertain a bill for specific performance. Pembroke *v.* Thorpe, 3 Swanst. 443, note. But the absence of a writing cannot be *a ground of jurisdiction*, though it may be a motive to exercise it; the court of equity only interferes where it has jurisdiction of the original subject-matter, namely, the contract; in which case the want of writing will sometimes not take away the jurisdiction. Lord *Cottenham*, C.; Kirk *v.* Bromley Union, 2 Phillips, 648. As to evidence of a contract in consideration of marriage, see 1 Fonb. Eq. ch. 3, § 10, note (*k*).

it declares that no action shall be brought to enforce a large number of contracts specifically enumerated, unless the same be in writing, (*y*) signed by the party sought to be charged. (*z*) It also provides, that all interests in lands, tenements, and hereditaments, except leases for three years, not put in writing, and signed by the parties or their agents authorized by writing, shall not have, nor be deemed in law or equity to have, any greater force or effect than leases or entails at will. This statute, or important parts of it, as has been previously said, have been very generally enacted in the States of this country, with various qualifications.

The reasons for requiring written evidence of important contracts are so strong, that it is not surprising to find that rules founded upon these reasons have always existed, in one form or another, in almost all civilized countries, and in many that are not called so. (*a*) Courts of equity, before the statute, seldom gave relief unless the contract was in writing; (*b*) by the statutes of some of our States, conferring equity powers, it is expressly required; and it may be said to be a principle of equity jurisprudence at this day, to give far greater weight to a written contract, and, practically, to require in almost every case that it should be written. (*c*)

(*y*) An undelivered deed cannot avail as a memorandum of the agreement; although it was read and assented to by both parties, and delivery postponed only for a collateral object, as to obtain a release of dower by the vendor's wife. Parker *v.* Parker, 1 Gray, 409. But the contrary has been held in Virginia. Bowles *v.* Woodson, 6 Gratt. 78; Parrill *v.* McKinley, 9 Gratt. 1; in neither of which cases, however, was the point necessarily involved in the decision. A will drawn in pursuance of an agreement to devise certain lands to the plaintiff, was executed, but having been lost, so that it could not be established as a testamentary instrument, it was held it might be treated nevertheless as a memorandum of the contract, and as such memorandum, its contents, the writing itself being destroyed or lost, might be proved by parol. Brinker *v.* Brinker, 7 Barr, 53.

(*z*) As to writings signed by an agent, or the agent of an agent, such as, an auctioneer, see Kemeys *v.* Proctor, 3 Ves. & B. 57, and the same case before Lord *Eldon*, L. C., 1 Jacob & W. 359.

(*a*) See 1 Greenl. Ev. § 262.

(*b*) See Lofft, 809.

(*c*) 1 Sugd. V. & P. ch. 3, sect. 8, pl. 39; Rankin *v.* Simpson, 19 Penn. St. 471. See Robson *v.* Collins, 7 Ves. 133; Davis *v.* Symonds, 1 Cox, C. C. 404; Ratcliffe *v.* Allison, 3 Rand. 537. But there is no rule of equity *requiring* contracts to be in writing; although there is, necessarily, a greater burden upon the party seeking the specific execution of an unwritten agreement, to establish its existence and terms clearly and satisfactorily. Alexander *v.* Ghiselin, 5 Gill, 183. There may be proof of a *consideration* additional, but not in contradiction to that expressed in a written agreement, see Clifford *v.* Turrell, 1 Younge & C., Ch. 148. A writing signed by the defendant as a proposal, must be accepted without variation by the other party, before it is capable of being enforced

It is a principle of equity jurisprudence, that parol evidence is admissible to rebut, but not to raise an equity; and this principle or rule gives rise here to an important distinction. Although to resist a specific performance, a defendant may show by parol that the written document does not fully represent the contract between the parties, (*d*) and thus defeat the bill, or compel the plaintiff to accept a performance with a variation; (*e*) yet a plaintiff cannot have a decree for a specific performance of a written contract with a variation upon parol evidence. (*f*) And it is as a departure from this fundamental principle, that the doctrine that the court may at once reform a written contract and proceed to enforce it as altered, has been resisted. (*g*) Even when offered by the defendant, the proof that a written agreement does not contain all the terms of the contract should be very clear. (*h*)

as an agreement; and at any time before acceptance the defendant may withdraw from it. Thornbury *v.* Bevill, 1 Younge & C., Ch. 554; Kennedy *v.* Lee, 3 Meriv. 451.

(*d*) Townshend *v.* Stangroom, 6 Ves. 328; Garrard *v.* Grinling, 2 Swanst. 244; Clowes *v.* Higginson, 1 Ves. & B. 524.

(*e*) When parties enter into a written agreement, whether about a subject-matter within the statute of frauds or not, and at the time an additional provision is agreed upon, which by mutual consent and without fraud is not inserted in the writing, it is competent to either party to resist a specific execution of the mere written agreement, by setting up the parol stipulation; but in such case the plaintiff may have a decree, upon consenting to incorporate in the contract the unwritten agreement thus set up by the defendant. In other words, the written agreement, in a case of this kind, binds both at law and in equity, subject to the right of either party, when sued in equity, to ask the court to refuse its aid unless the plaintiff will consent to the performance of the omitted term. Martin *v.* Pycroft, 2 De G., M. & G. 785, 15 Eng. L. & Eq. 376, reversing s. c. before Parker, V. C., 11 Eng. L. & Eq. 110. In Warren *v.* Thunder, 9 Irish Eq. 375, the Lord Chancellor, considering that the plaintiff, in originally setting forth the contract, had not acted fairly, was indisposed to give him any relief at all; but inasmuch as there was no objection by the defendant, he granted a specific performance of the agreement, as explained by the parol evidence introduced by the defendant.

(*f*) Woollam *v.* Hearn, 7 Ves. 211; Lord *Cottenham*, C., Squire *v.* Campbell, 1 Mylne & C. 480; London and Birmingham Railway Co. *v.* Winter, Craig & Ph. 61. Lord *St. Leonards*, Warren *v.* Thunder, 8 Irish Eq. 375.

(*g*) *Vide post.*

(*h*) *Wigram*, V. C., Clay *v.* Rufford, 8 Hare, 289; and see s. c. before *Stuart*, V. C., 19 Eng. L. & Eq. 355; Backhouse *v.* Mohun, 3 Swanst. 434, *n.* It has been held, that parol evidence is not admissible, even for the defendant, to *alter* the written agreement, although it may be received to show an equity *dehors* the agreement. Davis *v.* Symonds, 1 Cox, C. C. 404. And Lord *Brougham*, C., in a case before him, said: "It has been argued that, although evidence of matter *dehors* was not admissible for the purpose of raising an equity, it might be given for the purpose of rebutting an equity, and that, therefore, it was competent for the defendant, in a suit for specific performance, to avail himself of such evidence, though it was not competent to the plaintiff to do so. The distinction was sound within certain limits, and within those limits might be safely adopted. Parol evidence of matter collateral to the agreement might be received; but no evidence of matter *dehors* was admissible *to alter the terms and substance of*

But the principal exception from the operation of the statute of frauds, is where the answer of the defendant states or admits all the facts on which the plaintiff's case depends, and does not interpose the defence of the statute of frauds, or the want of writing. (*i*) Whether this exception rests in any degree, as has been suggested, on the idea that the requirement of the statute is in fact satisfied when the answer supplies a written memorandum of the contract; (*j*) or on the ground that it is competent to the defendant to waive a rule of law enacted for his benefit; (*k*) or on the broad ground that a statute for the prevention of frauds and perjuries has no proper application to a case where the defendant does not say there is any fraud, and where there can be no danger of perjury, because he himself has taken away all necessity of proving the contract by his own admission of it; (*l*) it is clear that the exception itself is well established. (*m*)

the contract." Croome *v.* Lediard, 2 Mylne & K. 260, 261; and in that case both the Master of the Rolls, and the Lord Chancellor refused to admit parol evidence to show that two separate contracts for the sale and purchase of distinct parcels of land were not independent, but a single agreement for an exchange. But see the criticism upon this case in 1 Sudg. Vend. & P. ch. 3, § 8, pl. 27. See Howard *v.* Rogers, 4 Harris & J. 278.

(*i*) Skinner *v.* McDouall, 2 De G. & S. 265, is an instance of a somewhat strict application of the rule, that a defendant, in order to obtain the benefit of the statute of frauds, must plead the statute, or else explicitly claim its protection by his answer. As to what does or does not constitute a sufficient pleading of the statute, see also, 2 Dan. Ch. Pr. (Boston, 1846), 747–752; Cooth *v.* Jackson, 6 Ves. 17. But the defendant is not in all cases excluded from the defence of the statute of frauds by omitting to plead it. "Where a defendant *admits* the agreement, if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement, good under the statute, or else that on some other ground it is binding on him; but where he denies or does not admit the agreement, the burden of proof is altogether on the plaintiff, who must then prove a valid agreement capable of being enforced." Lord *Cranworth*, C., Ridgway *v.* Wharton, 3 De G., M. & G. 689. And in a subsequent part of his lordship's judgment, he distinguished the case of a defence taken under the statute of frauds from the defence of the statute of limitations, and observed that the two cases were entirely dissimilar, and that the one statute affords no illustration towards the interpretation of the other. 3 De G., M. & G. 691, 692. See also, Ontario Bank *v.* Root, 3 Paige, 478; Small *v.* Owings, 1 Md. Ch. Dec. 366; Givens *v.* Calder, 2 Desaus. 187.

(*j*) 2 Story, Eq. Jur. § 755. This view of Judge *Story* is criticized by Chancellor *Johnson*, Winn *v.* Albert, 2 Md. Ch. Dec. 173, 174. (See the opinion of the Court of Appeals in the same case, 5 Md. 72), *vide per* Lord *Bathurst*, C., Popham *v.* Eyre, Lofft, 814.

(*k*) 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*d*). Opinion of *Johnson*, C., in Winn *v.* Albert, *ubi supra*, where it is said that in these cases equity is able to grant relief upon the ground of waiver, and upon that only.

(*l*) Treatise of Equity, B. 1, ch. 3, § 8

(*m*) Lord Thurlow, C., Whitechurch *v.* Bevis, 2 Bro. Ch. 566, 567.

But the reasons, excepting only that of waiver, would apply as well where the answer does in fact state or confess all the facts of the plaintiff's case, but denies that there was a contract in writing, and rests this defence on the Statute of Frauds. And there was a time when the courts of equity would disregard the statute in such cases and grant relief. (*n*) But this brings up the frequently occurring, exceedingly important, and equally difficult question, what are the limits of the obligation imposed upon equity by its own rule, of following the law? (*o*) For it is perfectly obvious that there can be here nothing else than obedience to the law, or direct violation of it. The law says, in perfectly explicit terms, that a certain contract shall have no force in law or in equity. A party sued in equity comes into court and says the plaintiff is right in asserting that this contract was made; but the court see that it is precisely such as the statute says shall have no force in this court, and the defendant rests on the statute. The court reply, that because the defendant admits such a contract as the law declares to be nowhere enforceable, they will enforce it. The absurdity of such ruling struck the English courts quite early, and they were inclined to overrule the earlier decisions, and refuse relief in such cases. (*p*) Now it may be considered, perhaps, established in England, (*q*) and more certainly in this country, (*r*) that relief would be refused in all cases of this kind.

Much of this reasoning would apply to another question which has arisen under the Statute of Frauds, namely, whether a part performance of an oral contract takes it out of the operation

See Attorney-General *v.* Day, 1 Ves. Sen. 221. The jurisdiction of equity may be perhaps best supported upon this last-mentioned ground and that of waiver jointly; neither one, it is conceived, would have been sufficient without the other. And such would appear to be the view taken by Mr. *Fonblanque* in his note above cited.

(*n*) Child *v.* Godolphin, cited 2 Bro. Ch. 566, 568.

(*o*) A court of equity is bound to follow the law where the public interest is concerned; and therefore, if a statute contain a general enactment, regulating the mode by which certain property shall be transferred, equity for the most cannot, any more than a court of law, give effect to a transfer which is not in compliance with the statute. *Knight Bruce*, L. J., Hughes *v.* Morris, 2 De G., M. & G. 356. See Stoddard *v.* Hart, 23 N. Y. (9 Smith), 566.

(*p*) See Whitchurch *v.* Bevis, 2 Bro. C. C. 559; Moore *v.* Edwards, 4 Ves. 24.

(*q*) Mitf. Pl. 267; 1 Fonb. Eq. B. 1, ch. 3, § 8, note (*d*); Blagden *v.* Bradbear, 12 Ves. 471. Lord *Eldon*, C., Rowe *v.* Teed, 15 id. 375

(*r*) Argenbright *v.* Campbell, 3 Hen. & M. 144, 160; Thompson *v.* Tod, Pet. C. C. 388.

of the statute. It is certainly the prevailing rule in this country that it has this effect. (*s*) In Maine, Massachusetts, Tennessee, North Carolina, and South Carolina, it seems to be otherwise; (*t*) and the rule is not very distinctly adopted in some other States. But generally it prevails. (*u*) In some of the States it is, however, confined within very narrow limits. Thus, in Pennsylvania, it is said that the land must be clearly designated, and notorious and exclusive possession taken in pursuance of the contract and maintained; and improvements, which constituted the consideration, made on the faith of the promised conveyance, and generally, that part performance is not enough to take the case from the statute, if it can reasonably be compensated in damages, and that usually it does admit of compensation. (*v*) But if such strictness prevails there, the doors are thrown open far more widely in other States.

(*s*) Newton *v.* Swazey, 8 N. H. 9; Eaton *v.* Whitaker, 18 Conn. 222; Phillips *v.* Thompson, 1 Johns. Ch. 131; Caldwell *v.* Carrington, 9 Pet. 86; Dugan *v.* Gittings, 3 Gill, 138; Hall *v.* Hall, 1 Gill, 383.

(*t*) Brooks *v.* Wheelock, 11 Pick. 439; Wilton *v.* Harwood, 23 Me. 131; Allen *v.* Chambers, 4 Ired. Eq. 125; Ridley *v.* McNairy, 2 Humph. 174; Patton *v.* M'Clure, Mart. & Yerg. 333; Givens *v.* Calder, 2 Desaus. 171. As respects Massachusetts and Maine, the explanation of this peculiarity seems to be that the courts in those States have no general equity jurisdiction, but only such as is conferred by special enactments.

(*u*) Caldwell *v.* Carrington, 9 Pet. 103. It is incumbent on the plaintiff to make out, by clear and satisfactory proof, a part performance of that very contract; it is not enough that the act relied on is evidence of *some* agreement; but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill. Philips *v.* Thompson, 1 Johns. Ch. 131; Beard *v.* Linthicum, 1 Md. Ch. Dec. 345; Mundorff *v.* Kilbourn, 4 Md. 459. As to what acts of part performance point sufficiently, unequivocally to the alleged contract, see Sutherland *v.* Briggs, 1 Hare 26. Where the statute of frauds is pleaded, and the plaintiff relies upon acts of part performance, he must allege the part performance in his bill or replication. Small *v.* Owings, 1 Md. Ch. Dec. 363. Where a written contract upon a matter within the statute of frauds is attempted to be enforced with a parol variation, on the ground of a part performance of it as varied, such part performance must have a distinct reference to the variation. Heth *v.* Wooldridge, 6 Rand. 605, where *Carr*, J., argues strongly against the specific execution, in any case, of a contract (within the statute of frauds) contained partly in a writing which originally embraced the entire agreement between the parties, and partly in subsequent parol modifications of the written agreement. It was agreed between two brothers, that one of them, who was subject to epileptic attacks, should be supported during his life by the other, to whom, in consideration thereof, he was to give all his property; he having been supported accordingly, after his death, a conveyance of his property was decreed to the other brother. Rhodes *v.* Rhodes, 3 Sandf. Ch. 279. But see Peifer *v.* Landis, 1 Watts, 392.

(*v*) See Moore *v.* Small, 19 Penn. St. 461; Haslet *v.* Haslet, 6 Watts, 464; Frye *v.* Shepler, 9 Barr, 91; Woods *v.* Farmare, 10 Watts, 195; Pugh *v.* Good, 3 Watts & S. 56. It has been held in Pennsylvania, that unless possession be delivered in the vendor's lifetime, the contract, if not in writing, cannot be enforced against his heirs. Sage *v.* M'Guire, 4 Watts & S. 228.

So it has been held, that a mere possession, without any improvement or expenditure, except for temporary purposes, and costing less than the received rents and profits of the land, is not sufficient. (*w*) Nor is a delivery and possession of a part enough; (*x*) nor is a possession without delivery, or without the intention or consent of the owner, (*y*) still less if the possession has been obtained by fraud or indirection. (*z*) So a mere continued possession by the plaintiff, he having been in possession before the contract, is not enough, unless there be declarations or circumstances distinctly showing that this continuity of possession is in pursuance and execution of the contract, and so regarded by the parties. (*a*) This may be made apparent by paying more rent, or making improvements, or expending money, or doing other things required by the contract.

Whether a mere payment is a part performance sufficient to sustain the application in equity, was more uncertain. At first,

(*w*) Wack *v.* Sorber, 2 Whart. 387, which, however, was a case of parol *gift* from parent to child. See Morphett *v.* Jones, 1 Swanst. 181; Frame *v.* Dawson, 14 Ves. 386; Hatcher *v.* Hatcher, 1 McMullan, Eq. 311. "Whether the possession be an unequivocal act, amounting to part performance, must depend upon the transaction itself, whether it be so circumstanced that it can refer only to a contract of sale; if it be so, the party may go into evidence of the terms." Lord *Manners*, C., Savage *v.* Carroll, 1 Ball & B. 282.

(*x*) Allen's Estate, 1 Watts & S. 383. It is to be observed that this was the case of a parol sale of two distinct parcels of land for a sum in gross; and therefore it decides no more than that the delivery of possession of one of two distinct and separate parcels, in pursuance of an entire contract for the sale of both, is not a sufficient part performance to take the case out of the statute. *Vide, per Kennedy*, J., id. 389. And see *contra*, Smith *v.* Underdunck, 1 Sandf. Ch. 581. Where two lots are put up and sold *separately* to the same buyer, a possession of one cannot be considered as a part performance of the contract for the sale of the other. Buckmaster *v.* Harrop, 7 Ves. 346. As to the general question, whether a certain contract for the sale of things having a distinct existence and value is or is not entire, see Crosse *v.* Lawrence, 9 Hare, 462, 10 Eng. L. & Eq. 7.

(*y*) But if the plaintiff be not shown to have otherwise some right to the occupation of the land, his possession is *prima facie* to be referred to the agreement. Gregory *v.* Mighell, 18 Ves. 333. If the tenant in occupation attorn to the vendee, with the knowledge and consent of the vendor, that is a sufficient delivery of possession. Williams *v.* Landman, 8 Watts & S. 55. Compare Brawdy *v.* Brawdy, 7 Barr, 157.

(*z*) Cole *v.* White, cited 1 Bro. C. C. 409.

(*a*) Wills *v.* Stradling, 3 Ves. 378; Frame *v.* Dawson, 14 Ves. 388; Johnston *v.* Glancy, 4 Blackf. 99; Christy *v.* Barnhart, 14 Penn. St. 260. See Kine *v.* Balfe, 2 Ball & B. 343; Gregory *v.* Mighell, 18 Ves. 328; Drury *v.* Conner, 6 Harris & J. 292. And a possession which can be referred to another, though subsequent, parol agreement is not sufficient. Owings *v.* Baldwin, 1 Md. Ch. Dec. 120. But it has been held, that a continuance of possession by the plaintiff, may be a part performance where he would otherwise be a trespasser. Smith *v.* Smith, 1 Rich. Eq. 130. As to possession in the case of a contract of sale between tenants in common, see Galbreath *v.* Galbreath, 5 Watts, 146

the court seemed to think that if but little money was paid, it was not a sufficient part performance; but if much, it was. (*b*) This distinction has not been made in modern times, and certainly would be of difficult application, if not in itself unreasonable. And now it seems to be quite well settled, that no mere payment of money will take the case out of the statute. (*c*) The reason is, that for any loss sustainable by such payment, damages recoverable at law are an adequate remedy. The same reason, perhaps, applies to all those acts of *quasi* ownership which are less than taking possession: such as surveying the estate; making out abstracts of title, and delivering them; negotiating for the sale of it; valuing stock or land, or the like. (*d*) In a late case, however, in New York, which seems have been well considered, it was held, that a mere payment of money was enough to take the case out of the statute, if it was made under such circumstances as would prevent the repayment of the money from restoring the plaintiff to his former position. (*e*)

It would, indeed, seem that the courts of equity in this country are tending to this test of the question, whether there has been a part performance of the contract, — namely, has the plaintiff, on the faith of the contract, entered upon the fair and honest execution of it, and so conducted himself that he cannot be replaced in his original position, and indemnified by any reasonable recovery of mere damages? This would seem to be an equitable and reasonable rule of itself; but it would seem almost as clearly to be an evasion, if not a violation of the law, when the contract related to any "interest in lands," and was not in writing.

(*b*) Main *v.* Melbourne, 4 Ves 720. See *ex parte* Hooper, 19 id. 479. In Lacon *v.* Mertins, 3 Atk. 4, Lord *Hardwicke* said: "Paying of money has been always held in this court as a part performance."

(*c*) Clinan *v.* Cooke, 1 Sch. & L. 40, 42; 1 Sugd. V. & P. ch. 3, § 7; 2 Story, Eq. Jur. § 760; Townsend *v.* Houston, 1 Harring. (Del.), 532. The rule that payment of the consideration is not part performance, of course has not application unless the consideration be *money*. Rhodes *v.* Rhodes, 3 Sandf. Ch. 279.

(*d*) Pembroke *v.* Thorpe, 3 Swanst. 437, n.; Frame *v.* Dawson, 14 Ves. 386 Cooth *v.* Jackson, 6 id. 12; Whitbread *v.* Brockhurst, 1 Bro. Ch. 412; Whitchurch *v.* Bevis, 2 id. 559; Redding *v.* Wilkes, 3 id. 400. But in Child *v.* Comber, 3 Swanst. 423, n., payment of fees to counsel, drawing drafts and engrossing them, and providing the purchase-money by the plaintiff, were held a sufficient part performance.

(*e*) Malins *v.* Brown, 4 Comst. 403.

The reason frequently given for the rule that part performance takes a case from the statute — that, where there is some performance, permission to the defendant to stop there would operate as a fraud on the plaintiff (*f*) — resolves itself into this, that a court of equity will set aside the Statute of Frauds, when, if applied, it would work or protect a fraud, or do the plaintiff the great wrong of leaving him as the mere trespasser without any legal excuse whatever for his entry upon land under a bargain with the owner, and perhaps an expenditure on it which would be for the owner's profit. But this seems to be somewhat inconclusive. If carried out, it might undoubtedly prevent much mischief and detriment which occasionally results from this law. But there is no rule of law, no statutory provision, of which a similar thing may not be said. The better reason seems to be this, that a part performance is in fact an execution of the contract, but an imperfect one, and needs the interposition of the court to compel those acts which are required to make the execution complete, and as beneficial to the plaintiff as it should be. The plaintiff actually asks, not for an execution of the contract, but, stating that it has been executed in a wrong and imperfect manner, asks that those things should be done which this imperfect execution requires in order to make it that which the parties contemplated, and the justice of the cause requires. (*g*)

(*f*) Mitf. Pl. 265; 2 Story, Eq. Jur. § 759. And Lord *Cranworth*, C., in Morgan *v.* Milman, 3 De G., M. & G. 33, assigned this as the ground of the interference of equity, and considered it to be extremely doubtful whether the principle was applicable to the case where a parol contract is attempted to be enforced against a *remainder-man*, with respect to which see also, Lowry *v.* Dufferin, 1 Irish Eq. 281. Sir *William Grant*, in Frame *v.* Dawson, 14 Ves. 386, gave the following definition: "It is necessary, therefore, to show a part performance, — that is, an act unequivocally referring to, and resulting from, the agreement, and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement."

(*g*) See Treat. of Eq. Book I. ch. 3, § 9; and also, Stockley *v.* Stockley, 1 Ves. & B. 23, a case of a family compromise, acquiesced in for a considerable period. In a case where the plaintiff has laid out money, or otherwise makes out a case of part performance, the court will endeavor with especial earnestness to collect, if it can, what the terms of the agreement were, although the plaintiff has failed to establish them with perfect precision. Lord *Cottenham*, L. C., Mundy *v.* Jolliffe, 5 Mylne & C. 177; Butler *v.* Powis, 2 Collyer, 161. Thus, where an agreement for a lease provided that the rent should be appointed by arbitrators, and they, in consequence of the landlord's refusal to enter into bonds to abide by the award, failed to fix the rent, but the tenant, though he paid no rent, went into possession and made expenditures upon the faith of the agreement, on a bill filed by the tenant, Sir *William Grant*, M. R.,

This reason would perhaps cover a great number of cases in which specific performance of contracts avoided by the Statute of Frauds has been decreed on the ground of a part performance; as where a defendant receives the land delivered to him under a contract, and builds upon it; sells his own homestead to pay for the new one, and removes his family to it; or by some sacrifice raises money to pay off a charge upon the estate which he occupies by delivery from the seller. If equity goes further than this, it may do justice between any two parties in any particular case; but it is in danger of doing for them illegal justice, and therefore of doing injustice to the whole community.

Under the clause in the 4th section of the statute, prohibiting any action to be brought charging any person upon any agreement made in consideration of *marriage*, unless the agreement or some note or memorandum thereof be in writing and signed by the party to be charged, the marriage itself is not a part performance of the contract, to take it out of the statute. (*h*)

It may be added, that there are in the books many instances in which equity has satisfied the justice of the case before it, in

held, that, as the contract was in part performed, the court must find some means of completing the execution, and it was referred to the Master to ascertain what rent should be paid. Gregory *v.* Mighell, 18 Ves. 328. See Boardman *v.* Mostyn, 6 Ves. 470, 471; Attorney-General *v.* Day, 1 Ves. Sen. 221; Jackson *v.* Jackson, 1 Smale & G. 184, 19 Eng. L. & Eq. 546; Maynell *v.* Surtees, 31, id. 475, 492, by the Lord Chancellor; Devonshire *v.* Eglin, 14 Beav. 530; Robinson *v.* Kettletas, 4 Edw. Ch. 67. And in Parkhurst *v.* Van Cortlandt, 14 Johns. 15, a majority of the Court of Errors of New York, reversing the decision of Chancellor Kent (1 Johns. Ch. 273), allowed their inclinations to find the terms of a contract in a case of partial performance to carry them very far.

(*h*) Montacute *v.* Maxwell, 1 P. Wms. 616. See Argenbright *v.* Campbell, 3 Hen. & M. 144. But where by a parol antenuptial contract it was agreed, in consideration of the marriage, that the intended husband should have certain bonds and other securities, the property of the lady; and should allow her during her life the interest thereon as pin-money; and after the marriage of the parties, and the death, first of the wife and then of the husband, upon a bill filed by the administrator of the wife against the husband's executor, praying that the bonds, &c. should be delivered up to the plaintiff (who, apart from the contract in question, was entitled to them under the laws of the State as choses in action not reduced into possession by the husband), it was held by the Court of Appeals, reversing the decision of the Chancellor (3 Md. Ch. Dec. 119), that the bill should be dismissed. Crane *v.* Gough, 4 Md. 316. The contract was there treated as one which had been executed; and the court refused to use the Statute of Frauds as an engine to oust the defendant from the position which he was considered as holding by virtue of such executed contract. An agreement in consideration of marriage was held to be taken out of the statute by part performance in Surcome *v.* Pinniger, 3 De G., M. & G. 571 17 Eng. L. & Eq. 212.

apparent disregard of other provisions of the Statute of Frauds. Thus, an executor having promised a testator to pay a legacy, and told him that he need not put it in his will, was held to pay it himself. (*i*) But even law, in an analogous case, has sustained the somewhat equitable action of assumpsit. For when a testator intended to provide by will for felling timber to raise money for his younger children, and his eldest son desired him not to disfigure the estate, and promised to provide the money; after the death of the father, the younger child brought an action of assumpsit against the heir, and it was held, that it could be maintained. (*j*) But most of these cases would come under equity jurisdiction as grounded on fraud. (*k*)

Still another class of questions arises under the equity jurisdiction as grounded on mistake. Undoubtedly equity will correct a mistake of either party, if it be material, and would, if known, have prevented or materially varied the contract. It will, as is said, "reform" the contract and enforce it as reformed. But the question has often come before our courts, whether oral evidence can be received to show the mistake, and thereby make it in fact a new contract, when an oral contract would be void or not enforceable by the Statute of Frauds. The course of adjudication is not uniform on this point. But while it cannot be denied that numerous authorities support a disregard of the statute in such cases, (*l*) others maintain its

(*i*) Oldham *v.* Litchford, 2 Vern. 506; Reech *v.* Kennigate, Ambl. 67.

(*j*) Dutton *v.* Poole, 2 Lev. 210, 1 Vent 318.

(*k*) Reech *v.* Kennegal, 1 Ves. Sen. 125.

(*l*) Gillespie *v.* Moon, 2 Johns. Ch. 585; 1 Story, Eq. § 161 and note; 1 Greenl. Ev. § 296, *a*; *Johnson*, C., Philpott *v.* Elliott, 4 Md. Ch. Dec. 273; Moale *v.* Buchanan, 11 Gill & J. 314, 325, which, however, was a case where there was a part performance of the contract; and this is a distinction to which importance has been attached. Coles *v.* Bowne, 10 Paige, 535. See Bellows *v.* Stone, 14 N. H. 201, per *Parker*, C. J. But in jurisdictions where this doctrine is entertained, it is held, that there must be *clear proof*, not only of the fact that a mistake has been committed, and that the contract, as written, does not express the intention of the parties, but also of the precise stipulation proposed to be inserted, or other correction proposed to be made. Philpott *v.* Elliott, 4 Md. Ch. Dec. 273; Hall *v.* Clagett, 2 Md. Ch. Dec. 151. And the court will not interfere to reform and enforce a contract, where the mistake is the result of the plaintiff's own omission of reasonable vigilance, and fraud is not proved upon the other party. Wood *v.* Patterson, 4 Md. Ch. Dec. 335. If the contract be altogether oral, equity cannot, on the ground of a supposed jurisdiction to reform it, proceed first to rectify it, and then to enforce specific performance; there must be *some* written expression of

authority. (*m*) We should say, on principle, that if a material part of a contract is not written, that contract is not written; and if it be one which the statute declares of no force unless written, courts of equity have no rightful power to give it force.

Law gives no relief where the mistake is one of law, or one arising from ignorance of law. This is well settled. It was once intimated that the maxim, "*ignorantia legis neminem excusat*," applied only to crimes and public offences; (*n*) but it is now universally agreed that it is of equal force in civil cases at law. (*o*) Whether this rule has equal force in equity may not be quite so certain. (*p*) In Ohio, it would seem that equity gives relief in mistakes of law, where law would not; (*q*) and in Kentucky, (*r*) and Connecticut, (*s*) there seems to be a disposition to give relief equally in mistakes of law and mistakes of fact. In England, at least, there is some conflict. (*t*) But even there the courts of equity appear now to adopt this rule; (*u*) and, in this country, the high authority of the Supreme Court of the United States, as well as the State courts generally, may be regarded as having conclusively established the rule, (*v*) subject, perhaps, to some qualification in particular cases.

A contract cannot, in general, be rescinded for an innocent mistake, if the rescission will work an injustice to either party

the contract to satisfy the statute. *Johnson*, C., Gough *v.* Crane, 3 Md. Ch. Dec. 135.

(*m*) Woollam *v.* Hearn, 7 Ves. 219; Winch *v.* Winchester, 1 Ves. & B. 378; Clarke *v.* Grant, 14 Ves. 519; Higginson *v.* Clowes, 15 Ves. 516. (The foregoing are judgments of Sir *William Grant.*) Rich *v.* Jackson, 6 Ves. 334, note *per* Lord *Loughborough*, C.; Clinan *v.* Cooke, 1 Sch. & L. 39. *Alderson*, B., Attorney-General *v.* Sitwell, 1 Younge & C., Ex. 583.

(*n*) Lansdowne *v.* Lansdowne, Mosely, 364, 2 Jacob & W. 205.

(*o*) See Lord *Cottenham's* remarks upon the case quoted in the preceding note, in Stewart *v.* Stewart, 6 Clark & F. 968. This rule is limited, however, to general public laws which prescribe a rule of action for the whole community; and has no application to special acts which are intended only to operate upon particular individuals. King *v.* Doolittle, 1 Head. 77.

(*p*) See Northrop *v.* Graves, 19 Conn. 548; Culbreath *v.* Culbreath, 7 Ga. 64.

(*q*) McNaughton *v.* Partridge, 11 Ohio, 223.

(*r*) Ray *v.* Bank of Kentucky, 3 B. Mon. 510; Gratz *v.* Redd, 4 B. Mon. 178.

(*s*) Northrop *v.* Graves, 19 Conn. 548.

(*t*) See cases before cited, and Bingham *v.* Bingham, 1 Ves. Sen. 126.

(*u*) Stewart *v.* Stewart, 6 Clark & F. 968; Cholmondeley *v.* Clinton, 2 Meriv. 171, 233, 328; Denys *v.* Shuckburgh, 4 Younge & C. Ex. 42.

(*v*) Hunt *v.* Rousmaniere, 1 Pet. 15, 8 Wheat. 211; Hepburn *v.* Dunlop, 10 Wheat. 179, 195; Shotwell *v.* Murray, 1 Johns. Ch. 512, 515; Lyon *v.* Richmond, 2 Johns. Ch. 51; Storrs *v.* Barker, 6 Johns. Ch. 169; Kenyon *v.* Welty, 20 Cal. 637.

or, in other words, if both parties cannot be replaced substantially in their former condition. (*w*)

Mistake as to foreign laws, or those of another State, is a mistake of fact. (*x*) The mistake of law of an agent, in paying out money without the special direction of his principal, has been held to be no bar to a recovery by the principal. (*y*)

Some disposition has been manifested to give relief for mistake of law, which would be withheld if there were only an ignorance of it. (*a*) We doubt whether this distinction will be found of much use.

A contract entered into under the supposition that the law affecting it was in accordance with a previous decision upon a similar state of facts, will not be set aside because of a subsequent decision by the same court overruling the former one, and declaring a different rule on the subject. (*b*)

Courts of law, as well as of equity, give relief where there is a mistake both of law and of fact; that is, one who is injured by his mistake of fact, does not lose his remedy by having mistaken the law also. (*c*)

SECTION VI.

OF COMPENSATION.

The doctrine of compensation often comes before courts of equity, and the various questions to which it gives rise have been very variously decided. Much uncertainty hangs over many of them at this moment. The most usual form in which this subject is presented is where there is a contract for the sale of an estate, and it cannot be carried into exact execution by

(*w*) Martin *v.* McCormick, 4 Sandf. 366.

(*x*) Bank of Chillicothe *v.* Dodge, 8 Barb. 233; Merchants Bank *v.* Spalding, 12 Barb. 302; Leslie *v.* Baillie, 2 Younge & C. Ch. 91; King *v.* Doolittle, 1 Head. 77.

(*y*) United States *v.* Bartlett, Daveis, 9

(*a*) Champlin *v.* Laytin, 18 Wend 407; Hall *v.* Reed, 2 Barb. Ch. 500.

(*b*) Kenyon *v.* Welty, 20 Cal. 637.

(*c*) Williams *v* Bartholomew, 1 B. & P. 326.

reason of some change or mistake about it, and specific performance is decreed with compensation to the party who would otherwise lose by the change or mistake. (*d*) At law it is difficult to adjust the damages to such circumstances, or, indeed, in many of these cases, to maintain the action. (*e*) So, at least, it is said, and undoubtedly is, at common law; but in some States a jury may find conditional damages to be released on specific performance of a contract, (*f*) nor are we aware of any inherent difficulty in this. In equity, at this time, the amount of this compensation is often ascertained by a jury, on an issue framed for that purpose; and formerly, it is said, this was almost always done, (*g*) instead of referring the case, as is more usual now, to a master. (*h*)

It is now generally admitted, that if the defect or diminution or incapacity is large and substantial, compensation cannot be made for it, and it is good ground for withholding a decree for performance. (*i*) It should seem, therefore, that only when the substance of the agreement can be fully executed, and only when a comparatively trifling adjustment is needed to satisfy the equities of the case, that compensation can be made. (*j*)

But this rule, if it be a rule, is very liberally construed.

So also, it is said that compensation is not damages, but must be carefully discriminated from them. (*k*) But it is not easy to understand this rule very clearly. If it is meant that

(*d*) Hill *v.* Buckley, 17 Ves. 401. For the circumstances which may entitle a defendant to compensation, though not sufficent to enable him to refuse a specific performance, see the judgment of Sir *William Grant*, M. R., Dyer *v.* Hargrave, 10 Ves. 506, where it was held, that a vendee cannot obtain compensation for a defect which he knew, or from its evident character must be presumed to have known, to exist, notwithstanding it was represented by the vendor not to exist.

(*e*) Lord *Alvanley*, C. J., Johnson *v.* Johnson, 3 B. & P. 169, 170.

(*f*) At least, such has been the practice in Pennsylvania, *Gibson*, C. J., Decamp *v.* Feay, 5 S. & R. 328; *Coulter*, J., Hauberger *v.* Root, 5 Barr, 112; Kribbs *v.* Downing, 25 Penn. St. 399.

(*g*) 1 Fonb. Eq. ch. 3, § 8, note (*b*).

(*h*) And if the parties have themselves stipulated that the compensation for errors in the description of the property shall be estimated by arbitration, upon their failure to get it settled in that manner, the court will settle it by reference to the master. Leslie *v.* Tompson, 9 Hare, 268, 5 Eng. L. & Eq. 171.

(*i*) Peers *v.* Lambert, 7 Beav. 546. A want of title to 209 acres, out of 698, was held to be too great a deficiency to be supplied by compensation, although the parcel of 209 acres was separated by a public road from the residue, and all the buildings were on the latter. Jackson *v.* Ligon, 3 Leigh, 161.

(*j*) Shackleton *v.* Sutcliffe, 1 De G. & S. 609.

(*k*) See White *v.* Cuddon, 8 Clark & F. 792. Lord Brooke *v.* Rounthwaite, 5 Hare, 298.

compensation is made only where it can be exactly ascertained and proportioned, and not estimated in general as damages often are, numerous cases contradict this. Formerly a purchaser has been compelled to take an estate which was liable to an uncertain and nearly contingent diminution or charge, with a compensation for this possibility, but it seems now to be admitted that these cases were erroneous. (*l*)

It is settled, also, that no purchaser is bound to take another thing — one different in nature — from that he bargained for; (*m*) as not a lease for an underlease, or *vice versa*, (*n*) nor a life-estate instead of a fee; (*o*) nor an estate in reversion instead of one in possession. (*p*)

If a purchaser find that he cannot have the estate he bargained for without a considerable deduction from it, he may insist on this, and on being allowed adequate compensation. (*q*)

(*l*) A purchaser will not be compelled to accept an indemnity as compensation. Balmanno *v.* Lumley, 1 Ves. & B. 224; Fildes *v.* Hooker, 3 Madd. 193. In the latter case, the Vice-Chancellor noticed a distinction between a risk going to the very estate in the land, and therefore putting in jeopardy the specific subject of the contract; in which case he held it to be clear, that the acceptance of an indemnity would not be required; and the case where a good title can be made, but it is subject to a pecuniary charge; and he stated that in cases of the latter kind a court of equity had compelled a specific performance of the contract upon security against the charge. Though even that course, he said, might have been questionable, as imposing, at all events, a considerable degree of trouble upon a purchaser, to which he had not subjected himself by the terms of his contract. Neither can a vendor, as it seems, be compelled to *give* an indemnity. In Balmanno *v.* Lumley, 1 Ves. & B. 225 (which was an application by a vendor), Lord *Eldon*, C., said "he did not apprehend the court could compel the purchaser to take an indemnity, or the vendor to give it." And in Aylett *v.* Ashton, 1 Mylne & C. 114, it was held, that an indemnity could not be required. And see Paton *v.* Brebner, 1 Bligh, 66, 67. But Lord *Eldon* himself had decreed an indemnity in Milligan *v.* Cooke, 16 Ves. 13, and whether the explanation of that case, suggested in the note in 1 Bligh, 67, be supported by the facts, *quære*. Lord *St. Leonards*, whose opinion appears to be that an indemnity cannot be required in any case, has questioned the propriety of the decree in Milligan *v.* Cooke, 1 Sugd. V. & P. ch. 7, § 1, p. 35.

(*m*) Drewe *v.* Corp, 9 Ves. 368; Halsey *v.* Grant, 13 Ves. 77, 79; Binks *v.* Lord Rokeby, 2 Swanst. 222. An agreement to convey ten lots is not satisfied by a tender of eight lots and the undivided half of four other lots. Roy *v.* Willink, 4 Sandf. Ch. 525.

(*n*) A purchaser who has contracted for an assignment of a term of ninety-nine years, will not be compelled to accept an underlease for a term of the same length, wanting three days, although the contract of sale contains a provision that any error or misstatement of the property or term of years, shall not vitiate the sale but shall be the subject of compensation, and although compensation be tendered; for no underlease is substantially the same thing as an assignment of the original term. Madeley *v.* Booth, 2 De G. & S. 718; 1 Sugd. V. & P. ch. 7, sect. 1, p. 10.

(*o*) A party who has agreed to purchase a freehold estate, cannot be compelled to take a leasehold, no matter how long the term. Drewe *v.* Corp, 9 Ves. 368. And see Wright *v.* Howard, 1 Sim. & S. 190.

(*p*) Collier *v.* Jenkins, Younge, 295.

(*q*) Wood *v.* Griffith, 1 Swanst. 54; Mortlock *v.* Buller, 10 Ves. 315; Mestaer *v.* Gillespie, 11 Ves. 640; Paton *v.* Rog-

But a seller could not insist that a purchaser should take an estate, with an equally large diminution, although he offered an adequate deduction from the price. (*r*) The reason is obvious. In the first case the plaintiff stands ready to perform his part of the contract. In the other, the plaintiff says he cannot perform his part, but demands performance from the defendant. In most cases the defendant stands in a more favorable position before the court than a plaintiff who seeks for specific performance. That is, it requires a less weight of objection to induce a court to withhold this relief, than of favorable circumstance or reason to persuade them to grant it.

As there is a rule at law for the construction of a contract, that it should be established rather than defeated, so equity, it is said, desires not forfeiture, but compensation. (*s*) And therefore, specific performance will be decreed, either with a modification of the bargain, or with compensation, provided neither be carried so far as to substitute a new contract for that which the parties made. (*t*)

Upon still another question the authorities, as yet, are much divided. It is, whether a court of equity will hold jurisdiction of a case, merely to make compensation to an injured party, where it cannot give specific performance. In other words, is compensation within the power of equity only as an incident of, or as collateral to, a specific performance which would otherwise be inequitable, or can it decree compensation by itself, without reference to specific performance? It is not to be denied, that high authorities, including the Supreme Court of the United States, appear to hold that a court of equity has this distinct and independent power of conpensation. (*u*) But it seems to

ers, 1 Ves. & B. 352; Nelthorpe *v.* Holgate, 1 Collyer, 203; Milligan *v.* Cooke, 16 Ves. 1; Seaman *v.* Vawdrey, 16 Ves. 390; Painter *v.* Newby, 11 Hare, 26, *nom.* Newby *v.* Paynter, 19 Eng. L. & Eq. 68, before *Wood*, V. C., affirmed 22 Law J. N. S. Ch. 85. See also, Waters *v.* Travis, 9 Johns. 450; see Ketchum *v.* Stout, 20 Ohio, 453. But the court may refuse a *cy pres* execution of an agreement to sell land in which the vendor has a limited estate only, if the third parties interested in the property, would be prejudiced thereby. Thomas *v.* Dering, 1 Keen, 729.

(*r*) See the cases in the preceding note.

(*s*) Page *v.* Broom, 4 Russ. 6, 2 Russ. & M. 214.

(*t*) Halsey *v.* Grant, 13 Ves. 77, 79; King *v.* Bardeau, 6 Johns. Ch. 38; Morss *v.* Elmendorf, 11 Paige, 277.

(*u*) Pratt *v.* Law, 9 Cranch, 494; Phillips *v.* Thompson, 1 Johns. Ch. 131 (compare Woodcock *v.* Bennet, 1 Cowen, 711, 756); Payne *v.* Graves, 5 Leigh, 561;

us rather a departure from the best-established principles of equity jurisprudence; and, indeed, to tend to the confusion of the distinction between equity and law, by taking away all limit to equity. We are unable to see how compensation in such a case is any thing else than damages. (*v*) Judge Story, who admits that the cases of this kind have been pushed quite too far, supposes one, in illustration of a class, in which, as he says, "there seems to be a just foundation for the exercise of equity jurisdiction." (*w*) It is where one who has orally bargained away an estate, conveyed a part, and sold the rest for value to a buyer ignorant of the first sale, and innocent of the fraud, and the first buyer cannot have specific conveyance, but prays for compensation. Here, however, if the circumstances of the case permitted an action for the fraud, damages would be recoverable at law, and would be measured there as in equity. And if the action could not be sustained, or damages could not be recovered, it would present the simple case of a party, who has wholly neglected the wise and plain and well-known rules of law for the prevention of fraud, and finds that the law gives him no indemnification for the loss he has brought upon himself. Nor do we see any distinct principle which would justify equity relief in such a case, which would not give it as well in every case where the buyer of a house was cheated; cases in which, says Lord Chief Baron Alexander, "no one, I apprehend, ever thought of filing a bill in equity." (*x*)

Johnston *v.* Glancy, 4 Blackf. 94; Rockwell *v.* Lawrence, 2 Halst. Ch. 190. Aday *v.* Echols, 18 Ala. 353; 2 Story, Eq. Jur. § 798, and note 1. But compare id. § 799. See Bowie *v.* Stonestreet, 6 Md. 418.

(*v*) And see Todd *v.* Gee, 17 Ves. 278; Gwillim *v.* Stone, 14 Ves. 128; Clinan *v.* Cooke, 1 Sch. & L. 25; Newham *v.* May, 13 Price, 749; Clarke *v.* Rochester, &c. Railroad Co. 18 Barb. 356.

(*w*) 2 Story, Eq. Jur. § 798. See Morss *v.* Elmendorf, 11 Paige, 277, 288.

(*x*) Newham *v.* May, 13 Price, 752. But it seems compensation may be given where there would have been a case proper for a specific performance, but for the conduct of the defendant in wilfully disabling himself from performing his contract. Denton *v.* Stewart, 1 Cox, 258; Sir *William Grant,* M. R., Blore *v.* Sutton, 3 Meriv. 248; Greenaway *v.* Adams, 12 Ves. 401, 402; Todd *v.* Gee, 17 Ves. 278; Woodcock *v.* Bennet, 1 Cowen, 711. (But see Clinan *v.* Cooke, 1 Sch. & L. 25; Sainsbury *v.* Jones, 5 Mylne & C. 3, 2 Beav. 465.) And it has been held to make no difference whether the disabling act of the defendant be done before or after the commencement of the suit. Andrews *v.* Brown, 3 Cush. 130. Whether the plaintiff's claim to compensation in such case is affected, if he had knowledge when he filed his bill, that a specific performance was impossible, *quære.* See Hatch *v.* Cobb, 4 Johns. Ch. 560. *Wilde,* J., 3 Cush. 135. See Sainsbury *v.* Jones, *ubi sup.*

SECTION VII.

OF IMPOSSIBILITY AND OTHER DEFENCES.

Impossibility of either of three kinds may prevent a decree for specific performance. If the court cannot enforce their own decree, this is a reason for not issuing one. (*y*) For example, if the manager of a theatre asks a court to compel an actor to execute his agreement to play for him, the court cannot then tell in what manner he is to play the part, and this is of the essence of the bargain. (*z*)

But the impossibility may be on the part of the defendant. (*a*)

(*y*) Baldwin *v.* Society for Diffusing Useful Knowledge, 9 Sim. 393; Clarke *v.* Price, 2 Willson, Ch. 157; Gervais *v.* Edwards, 2 Drury & W. 80, 1 Con. & L. 242, was an application for the specific performance of an agreement between the plaintiff and defendant for the straightening of a winding river which divided their lands; which agreement, besides providing for a mutual compensation for soil taken from one or the other by the new cut, stipulated for the adjustment and compensation of certain contingent damages which might be thereafter occasioned. The plaintiff in his bill waived his own right to compensation for the future and contingent damage, but it was held, that the other provision for the benefit of the defendant (which it was not possible for the plaintiff so to get rid of), was an invincible obstacle to the specific enforcement of the contract. The observations of the Chancellor (*Sugden*) are very instructive: "As far as the merits of the case go, I would decree the specific execution of this contract; but I do not see how it is possible. If I execute it at all, I must execute it *in toto;* and how can I execute it prospectively? The court acts only on the principle of executing it in specie, and in the very terms in which it has been made; therefore, when you come to the specific execution of a contract containing many particulars, you must see that it is possible to execute it effectually. The court cannot say, that when an event arises hereafter, it will then execute it. In the case of a decree for the execution of a contract for the sale of timber, it is no objection that it is to be cut at intervals, that is certain, and the mere delay will not prevent the court from executing it; there the agreement is executed in specie; the court decrees to one, the very timber contracted for, to the other, the very price. If I am called on now to execute this agreement, I can only specifically execute a portion, whereas I am bound to execute it all." After distinguishing the case of an agreement for a *covenant* for a thing to be done thereafter, which can be specifically executed by the making of the covenant, from a case like the present, of an agreement to do the thing itself when the contingency shall give occasion for it, his lordship added: "No precedent has been cited: but, indeed, none is necessary. It is a question of principle; and I am clearly of opinion, that if I gave a decree now, it would not be a specific execution of the contract, but only a declaration that there ought to be a specific execution of it hereafter. I must therefore leave the plaintiff to his remedy at law." 1 Con. & L. 244, 245.

(*z*) De Rivafinoli *v.* Corsetti, 4 Paige, 264. But see *ante*, p. 375, note (*p*).

(*a*) As where the defendant has contracted that a third party shall do some act which such third party refuses to do. See Thornbury *v.* Bevill, 1 Younge & C., Ch. 564. If the contract particularly

We have considered elsewhere when an impossibility of this kind is a sufficient defence to an action at law for damages. (*b*) But it is obvious that an impossibility, which is wholly the fault of the defendant, and would not operate as any defence at law, might still suffice to prevent a decree for specific performance. For if such a decree issued, it could only end in money compensation, or in a mere punishment of the defendant, which would be useless to the plaintiff; but costs would probably be given to a plaintiff in such a case, if specific performance were denied. Neither would specific performance be decreed when the defendant can do the thing but only by a violation of law; (*c*) hence a vendor will not be ordered to make sale of a

provide that some act of the other party, the parties jointly or a third party, or some other event, shall be the foundation for what the defendant is to do, then if such act or event have not occurred or been done, the defendant (not having been in fault in the matter) will not in general be compelled to perform the contract. Thus, if vendor and vendee have stipulated that the price shall be ascertained by arbitration, whether by a particular arbitrator or by arbitration generally, in such case if the arbitration do not proceed as agreed, and the price is not ascertained according to the mode in which the parties have stipulated, equity has no right to make a different contract from that which the parties have entered into, and ascertain it for them in some different mode. Lord *Cranworth*, C., Morgan *v.* Milman, 3 De G., M. & G. 34, 35; South Wales Railway Co. *v.* Wythes, 1 K. & J. 186, 31 Eng. L. & Eq. 226, 5 De G., M. & G. 880. And see Milnes *v.* Gery, 14 Ves. 400; Blundell *v.* Brettargh, 17 Ves. 232; Gourlay *v.* The Duke of Somerset, 19 id. 429. Compare Gregory *v.* Mighell, 18 id. 328; and other cases of the same class cited *ante*, p. 395, n. (*g*). In Morgan *v.* Millman there was an agreement between A and B, that B should pay A for certain lands undertaken to be sold under a power, a compensation to be settled by arbitration, or in another specified mode as A should determine; and A having died without appointing an arbitrator, his executor filed a bill against the remainderman and B, for a conveyance of the land to B, and completion of the contract; and upon this state of facts, making a somewhat different case from the simple one of vendor and vendee, the *Lord Chancellor* said: "It is quite clear that the only point remaining in doubt, namely, the amount of the purchase-money, never was ascertained by either of the modes which were pointed out. It has been suggested that that was immaterial; that the court may ascertain it, or that some other step may be taken different from that which the parties stipulated as the mode of ascertaining what the amount of the purchase-money should be. I confess that upon principle as well as upon authority, the court cannot here, as it seems to me, take upon itself to do that; if indeed there had been an agreement that the price should be that which was to be ascertained by a fair valuation, then the court might interfere." See the judgment of *Wigram*, V. C., Downs *v.* Collins, 6 Hare, 433, 437; Frederick *v.* Coxwell, 3 Younge & J. 514. Where a literal performance is impossible, or would not, owing to a change of circumstances, accomplish the object of the agreement, equity will sometimes give relief in some other manner as near as possible to that originally stipulated for. Thomas *v.* Vonkapff, 6 Gill & J. 372. It *seems* that in the absence of special circumstances, a party cannot be let off from his contract to purchase one estate because of his inability to complete a contract he had entered into with the vendor at the same time for the *sale* of another estate. Croome *v.* Lediard, 2 Mylne & K. 260.

(*b*) *Ante*, ch. III. sect. 2.

(*c*) In the language of Lord *Redesdale*, to entitle the plaintiff to a specific per-

thing, or give a deed of land when he has no legal title. (*d*) But if there be the strictest impossibility that the party himself should do the thing, — as if he be dead, — but there are those who could do it and should as his representatives, there are many cases in which they are required to do it.

It is obvious that an agreement to make a certain disposition of property by last will, is one which, strictly speaking, is not capable of a specific execution — not in the party's lifetime, because any testamentary instrument is by its nature revocable; and after his death it is no longer possible to make his last will. Yet it has been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms. (*e*) And the court will not allow this *post mortem* remedy to be defeated by any devise, or conveyance in the lifetime inconsistent with the agreement, unless indeed rights of purchasers deserving of protection should intervene. (*f*) But if

formance, he must show, that in seeking the performance he does not call upon the other party to do an act which he is not lawfully competent to do. Harnett *v.* Yeilding, 2 Sch. & L. 554; Wood *v.* Griffith, 1 Swanst. 55; Sears *v.* City of Boston, 16 Pick. 357. A trustee will not be compelled to commit a breach of trust. Bridger *v.* Rice, 1 Jacob & W 74; White *v.* Cuddon, 8 Clark & F. 766; Mortlock *v.* Buller, 10 Ves. 292; Bellringer *v.* Blagrave, 1 De G. & S. 63. No matter how fair the conduct of the other party may have been. Ord *v.* Noel, 5 Madd. 438. Unless under special circumstances a party will not be compelled to do an act which would expose him to a forfeiture. Peacock *v.* Penson, 11 Beav. 355.

(*d*) Malden *v.* Fyson, 9 Beav. 347. In such cases the rule is to dismiss the bill, but without costs. Id.

(*e*) Brinker *v.* Brinker, 7 Barr. 53; *Gibson*, C. J., McClure *v.* McClure, 1 id. 378; *Rogers*, J., Logan *v.* McGinnis, 12 Penn. St. 32; Mundorff *v.* Kilbourn, 4 Md. 459, 463. And see the cases in the next note, and Scully *v.* Scully, Sugden, Law of Property, in House of Lords, 104. A contrary doctrine was declared in Stafford *v.* Bartholomew, 2 Cart. (Ind.), 153. See Harder *v.* Harder, 2 Sandf. Ch. 17; Carlisle *v.* Fleming, 1 Harring. (Del.), 421. It has been held, that a will made in pursuance of the agreement, may, in the event of its failing to operate as a will, serve as a memorandum of the agreement within the statute of frauds; and that if it be lost, its contents, as such memorandum, may be proved by parol. Brinker *v.* Brinker, 7 Barr, 55. See Rowan's Appeal, 25 Penn. St. 294.

(*f*) In the case of a covenant (such as appears to be quite usual in English family settlements), that the covenantee shall, at the death of the covenantor, receive by his will a certain proportion of the real or personal estate (as the case may be) of which he shall die seised or possessed; it is held, that while it is in the power of the covenantor, by conveyance operating in his lifetime, to dispose of his whole interest in the property or any part of it, he cannot convey it away in violation of the agreement, either by any testamentary act, or any act which, though not testamentary in form, is so in effect; if, therefore, he make a conveyance in which he retains a right of control over the property, or reserves to himself a life-estate (or perhaps even a less interest), such conveyance, being a fraud upon his agreement, may be set

one contracts to devise, and during his life conveys the land away, equity sometimes requires his representatives to make full compensation. As a general rule, it may be said, that where a specific performance would be decreed as between the original parties to a contract, it will be decreed as between all who claim under them, unless new and intervening equities would make the decree operate injustice towards these parties. (*g*) In some of the United States the specific performance of a contract of a deceased party is provided for by statute. But we suppose that every court having equity powers must be able to do this.

An impossibility of performing the contract is to be distinguished from an impossibility of making that use of the consideration which was contemplated at the time the contract was made. For this latter impossibility is not necessarily a good defence against a prayer for specific performance. (*h*)

The third kind of impossibility is that which operates through the necessary requirement in equity of a fair and equal mutuality. (*i*) If, therefore, the plaintiff ought himself to do something as his part of the bargain which he seeks to enforce, which thing he cannot do, (*j*) or even if it be something which he is bound to do, but has not done, (*k*) and the court cannot com-

aside, and the estate being then subject to the covenant, will be decreed to pass as if the covenant were specifically executed. Fortescue *v*. Hannah, 19 Ves. 67; Logan *v*. Wienholt, 7 Bligh, N. S. 1; Sugden, Law of Property in House of Lords, 106; Randall *v*. Willis, 5 Ves. 262.

(*g*) *Ante*, sect. 1, p. 358.

(*h*) Thus a railway company, who had contracted to purchase certain land for the purposes of the construction of a branch road, were held not to be excused from paying the agreed price, by reason that they had allowed their powers to take and use the land to lapse and expire by parliamentary limitation. Hawkes *v*. Eastern Ry. Co., 1 De G., M. & G. 737, per Lord *St. Leonards*, C., affirming decision of *Knight Bruce*, V. C., 3 De G. & S. 743.

(*i*) It is a corollary of the principle of mutuality, that what was agreed to be done on the part of the plaintiff *should distinctly appear*. Wingate *v*. Dail, 2 Harris & J. 77; Morgan *v*. Rainsford, 8 Irish Eq. 299.

(*j*) "It would be quite new," said Sir *William Grant*, "for a court of equity to enforce performance on one side without examining whether there be a capacity to perform on the other." Fildes *v*. Hooker, 2 Meriv. 428. But the fact, that when the agreement was made it was subject to a contingency which might have rendered performance by the defendant impossible, constitutes no objection to the execution of the contract if the contingency did not happen. Dowell *v*. Dew, 1 Younge & C., Ch. 345, 356.

(*k*) Thus, where the plaintiff prayed the specific execution of an agreement for a lease, entered into a long time before, under which agreement he had entered into possession, and made expensive improvements, Sir *George Turner*, V. C., refused to decree a lease, on the ground that some of the covenants which it would contain had already been broken by the plaintiff, so that, had the lease been in existence, according to the agreement, the

pel him to do it, equity will not decree specific performance against the other party. (*l*) Thus, if an infant bring a suit for specific performance, it may be a sufficient reason for denying it that there is something for him to do which he does not offer, and which the court cannot compel him to do. (*m*) But if the infant, after coming of age, files a bill to obtain performance of the contract, he thereby becomes bound by the contract, and the want of mutuality is cured. (*n*) So, if he in any other manner affirm the contract at majority, it becomes mutual. (*o*) In one case the court refused to restrain a defendant from purchasing a certain commodity where he would, although he had agreed to purchase it only of the plaintiff, who sought to compel him to do so; and the ground of the refusal was, that the court could not compel the plaintiff to supply the defendant with as much of that commodity as he might want. (*p*)

A probable disability of the plaintiff, although he is not yet chargeable with any default, may be ground for a court of equity to refuse to interpose. Thus, if the terms of the contract require the plaintiff to pay money at a future time, his insolvency may deprive him of the right to compel the other party to perform his agreement. (*q*) And it has been held, that

lessor would have had a right to reënter. Gregory *v.* Wilson, 9 Hare, 683, 10 Eng. L. & Eq. 133. The court, in requiring something to be done on the part of the plaintiff as a condition precedent to his obtaining the relief prayed, will sometimes go beyond the letter of the contract, and impose something which the defendant could not have demanded had he been the party applying for the interposition of the court. See Moxhay *v.* Inderwick, 1 De G. & S. 708. An understanding of the parties, collateral to a written contract between them, and not intended to form a part of it, cannot occasion a denial of a specific performance of the contract; but it may have the effect to induce the court not to decree a specific performance without taking care that the defendant should have the benefit of such understanding. London and Birmingham Railway Co. *v.* Winter, Craig & Ph. 57, 61. And see *ante*, sect. 5, p. 387.

(*l*) But if the thing to be done by the plaintiff did not enter very materially into the consideration of the agreement, and the defendant at the time contemplated the possibility of a failure on the plaintiff's part in that respect, and made provision for the case in the contract itself, it will be no obstacle to the granting of a decree of specific performance. Lord *v.* Stephens, 1 Younge & C., Ex. 222; 1 Fonbl. Eq. B. I. ch. V. § 8, note (*g*).

(*m*) Flight *v.* Bolland, 4 Russ. 298; Hargrave *v.* Hargrave, 12 Beav. 411.

(*n*) Milliken *v.* Milliken, 8 Irish Eq. 16. And see Flight *v.* Bolland, 4 Russ. 298.

(*o*) See Milliken *v.* Milliken, 8 Irish Eq. 27, 28.

(*p*) Hills *v.* Croll, 2 Phillips, 60. There is a more full report of the judgment of the Lord Chancellor (*Lyndhurst*), in a note in 1 De G., M. & G. 627. This case, which had had a great deal of doubt thrown upon it previously, was recently referred to with approval by Lord *St. Leonards*, C., Lumley *v.* Wagner, 1 De G., M. & G. 627.

(*q*) Franklin *v.* Lord Brownlow, 14 Ves. 556; Lord *Langdale*, M. R., Neale *v.* Mackenzie, 1 Keen, 474. And see Brashier *v.* Gratz, 6 Wheat. 539.

the insolvency of an intended lessee is a weighty objection to granting him a decree for a lease. (*r*)

If the nature of the duties of a servant is such that it is impossible for a court to enforce by its decree his faithful and proper discharge of them, it is not competent to him, on his part, to compel the employer to permit him to perform those services. (*s*) There are many other cases where the principle, that equity requires mutuality, has received illustration; and it seems to have been invoked sometimes when a more legitimate ground of decision might have been found in some of those more general doctrines, determining the specific enforcement of contracts, which have been treated of in previous portions of this chapter. We have placed, in the note below, a full examination of the cases on this difficult subject. (*t*)

(*r*) Buckland *v.* Hall, 8 Ves. 92. The insolvency of the plaintiff has been held to be a ground for refusing a decree for a lease, although his discharge was granted as long before as six or seven years, but subsequently to the agreement. Price *v.* Assheton, 1 Younge & C., Ex. 444, per *Alderson*, B. Compare the same case at an earlier stage, before Lord *Lyndhurst*, C. B., 1 Younge & C., Ex. 91, 93. While it is not necessary that the party should have taken the benefit of the Insolvent Laws, or that he should have given up all his property to his creditors, there must yet be satisfactory proof of general insolvency, and a previous default in a particular instance is not enough. Neale *v.* Mackenzie, 1 Keen, 474.

(*s*) Pickering *v.* The Bishop of Ely, 2 Younge & C., Ch. 267.

(*t*) The meaning of the rule of equity, requiring that contracts must be mutual, is not very clear; nor is it easy to make a satisfactory classification of the cases in which it has been announced as the ground of decision. By mutuality seems sometimes to be intended mutuality of *remedy;* in other cases, mutuality of *agreement;* but in neither sense is the rule of universal application. 1. A difference in the remedy, or power of enforcing the contract, may exist in several cases. One party's conduct may be such as to deprive him of the right which the other possesses of applying for the interposition of the court. South-Eastern Railway Co. *v.* Knott. 10 Hare, 122, 17 Eng. L. & Eq. 555. And though no moral imputation rest on him, the defendant cannot set up the existence of an impediment *of his own creation* to his enforcement or enjoyment of the part of the contract beneficial to himself; in such a case, it is a sufficient reply to him that the contract was mutual when it was made, and if it has since become otherwise, it is his own fault. Lord *St. Leonards*, C., 1 De G., M. & G. 755. So a subsequent inequality of obligation occasioned by the act of God, is not of itself a valid ground of objection. Stapilton *v.* Stapilton, 1 Atk. 10. Another instance appears in the doctrine, denied it seems by Lord *Redesdale*, Lawenson *v.* Butler, 1 Sch. & L. 13, but now perfectly established, that a purchaser may compel a conveyance, although the vendor could not have enforced specific performance because of some infirmity in the title. Sutherland *v.* Briggs, 1 Hare, 34. *Ante*, § 6, p. 399. And in cases within the statute of frauds, it is now clear (although a contrary opinion upon this point also was expressed by Lord Redesdale, 1 Sch. & L. 20), that the circumstance that the defendant only signed the agreement, so that he could not have compelled the plaintiff to perform it, constitutes no good ground of objection to the plaintiff's suit. Backhouse *v.* Mohun, 3 Swanst. 434, n.; Seton *v.* Slade, 7 Ves. 275; Western *v.* Russell, 3 Ves. & B. 192; Ormond *v.* Anderson, 2 Ball & B. 370; Field *v.* Boland, 1 Drury & W. 49; Clason *v.* Bailey, 14 Johns. 489. From an absolute agree-

It may happen that the plaintiff has performed a material part of what he was bound by the agreement to do, and is pre-

ment, signed by the party to be charged, must be distinguished a writing which, though signed by one party and bearing the form of an agreement, is really a mere proposal; such a writing is turned into an agreement, and can be enforced in equity, by the other party, upon his acceptance of it by writing. Palmer *v.* Scott, 1 Russ. & M. 394; or such acceptance may be evidenced and made effectual by the plaintiff's acts of part performance. Dowell *v.* Dew, 1 Younge & C., Ch. 345. See Norton *v.* Mascall, 2 Vern. 24, 1 Eq. Cas. Ab. 51. Whether the plaintiff's filing a bill for a specific performance is a sufficient assent to remove the objection of a want of mutuality when it would otherwise exist, is not perfectly free from doubt. A trader executed an assignment to trustees in trust to sell, and the trustees made a sale to the defendant. The assignment being an act of bankruptcy, the assignees of the bankrupt might have avoided the subsequent sale; but it was held that, by filing a bill against the defendant to enforce specific performance, they made the contract their own, and were entitled to have it specifically executed. Goodwin *v.* Lightbody, Daniel, 153. So if a contract be modified by the defendant, and the plaintiff bring a suit to obtain specific performance of it with the modification, the filing of the bill is, it seems, a sufficient assent by the plaintiff to the modified contract. Lord *Plunket*, C., Field *v.* Borland, 1 Drury & W. 46. See also, Milliken *v.* Milliken, 8 Irish Eq. 16, cited *infra;* Martin *v.* Mitchell, 2 Jacob & W. 426. Agar *v.* Biden, 2 Law J., N. S. ch. 3. But see Gaskarth *v.* Lowther, 12 Ves. 114. It has been intimated, that if husband and wife, seised in fee, in the wife's right contract to sell, they may, by bill in equity, enforce a performance of the contract against the purchaser, although he could not, in like manner, have compelled a conveyance of the land. *Knight Bruce*, V. C., Salisbury *v.* Hatcher, 2 Younge & C., Ch. 62. The principal instances of the denial at this day of relief in equity to one party, because a corresponding remedy would not be open to the other, are those mentioned in the text; namely, where the plaintiff is insolvent, or an infant, or a servant employed to perform services of **trust**; to which is to be added, according to a doctrine recently established, the case where the contract contains an agreement, on the plaintiff's part, to give at a time future, with respect to the suit in court, some yet unascertained thing, or to perform a series of acts that must necessarily extend over a future period; the execution of which agreement, therefore, the court cannot, by a present decree, insure to the defendant. Gervais *v.* Edwards, 2 Drury & W. 80; Hills *v.* Croll, 1 Coop. Cas. *temp.* Cott. 85. Lord *St. Leonards*, Ch., 1 De G., M. & G. 627. But see Ball *v.* Coggs, 1 Bro. P. C. 296. 2. From the class of cases presenting the question of a want of mutuality *in the agreement itself*, it is difficult to extract any clear principle. It would be convenient, if it could be laid down, that where an undertaking, on the plaintiff's part, is requisite to constitute a consideration for the defendant's agreement, such undertaking must exist as a component part of the contract; and that where, on the other hand, there is a sufficient equitable consideration for the defendant's agreement, independent of something which the plaintiff by the terms of the contract may at his election do, but is not bound to do, there the defendant may be compelled to perform, notwithstanding the plaintiff's freedom with respect to such further acts on his side. And this distinction finds considerable support in authority. It resolves the question of mutuality into the broader one of consideration, and hence brings up the difficulty, that the courts have so frequently treated the objection of want of mutuality as distinct from that of want of consideration. This difficulty is, however, in some measure removed by noticing that there may be a defect in the consideration, either because there is no valid promise on the plaintiff's part, or because that which is promised is a thing of no value; now the latter form of defect is what is called, in the cases alluded to, a want of consideration, while the former, though, to say the least, quite as much a want of consideration is described by the phrase, "want of mutuality." It will be useful to observe the circumstances which have been held to constitute a want of mutuality. An agreement that the plaintiff should have a certain estate for £1,500 less than any other purchaser would give for it, was held ob-

vented from doing the whole by an impossibility, in no way his fault. If he now seeks specific performance from the other

jectionable on this ground; inasmuch as the plaintiff was not bound to take it at any price. Bromley *v.* Jeffries, 2 Vern. 415. The plaintiff, an attorney, had promised to give up his business to the defendant, who agreed to pay him a sum of money therefor; and Sir *William Grant*, M. R., refused a decree for the payment of the money, on the ground that the court had no means of compelling the plaintiff to perform his part of the agreement, or of putting the defendant in possession of the business. Bozon *v.* Farlow, 1 Meriv. 459. An agreement having been entered into between A and another, for the purchase by the latter of certain land of which A was only tenant for life, A's son, in whom the title was, filed a bill against the purchaser to compel a completion of the purchase; it was objected that the bill would not lie, because, the plaintiff, not being bound by his father's agreement, the remedy was not mutual, and it was so held. Armiger *v.* Clarke, Bunb. 111. But there was there no contract at all between the plaintiff and defendant. The defendant, by an agreement under seal, demised land to the plaintiff without rent or other expressed consideration, and covenanted to make a conveyance to the plaintiff in fee upon payment by him of a certain sum per acre; a decree for a specific performance of the agreement to convey was refused. Boucher *v.* Vanbuskirk, 2 A. K. Marsh. 345. Geiger *v.* Green, 4 Gill, 472, was the case of an agreement between the owner of certain land and the plaintiff, by which the latter was granted the privilege of getting ore from the land, paying therefor 25 cents per ton; after some ore had been dug under the agreement, the plaintiff being interrupted by the defendant, prayed an injunction and a decree for a specific performance; but it was refused. Tyson *v.* Watts, 1 Md. Ch. Dec. 13, was also a mining contract, similar in its general features, but differing in reciting a consideration of one dollar paid by the plaintiff, and obliging him to commence proper explorations on or before a certain day; it was held to want mutuality. On the other hand, Stansbury *v.* Fringer, 11 Gill & J. 149, strongly supports the distinction which has been suggested. There it was agreed between A and B. that A should hold certain land of B for a term of years, paying taxes, and making certain improvement; and it was further agreed, that A might at any time during the term at his pleasure become the purchaser of the land at a stipulated price; and A having tendered the price, filed a bill to compel B to make a conveyance; it was objected that the contract was not mutual, because there was no obligation to purchase upon the plaintiff; but the court held, that by occupying the land, paying taxes, and making the stipulated improvements, he had given the consideration for his privilege of purchasing the land, and a specific performance was decreed. And see Hackett *v.* McNamara, Lloyd & G. *temp.* Plunket, 283; Ball *v.* Coggs, 1 Bro. P. C. 296. Compare Boucher *v.* Vanbuskirk, *supra*. The owner of a certain parcel of land entered into an agreement under seal with a Railroad Company, by which he granted them the privilege of running their road through his lands upon payment of a certain compensation for the soil appropriated and the damages occasioned; on a bill filed by the company for a specific performance, it was contended that the contract wanted mutuality, inasmuch as the plaintiffs were under no obligation on their part to take the land or pay the price; but the objection was not sustained. Western Railroad *v.* Babcock, 6 Met. 346. (And see Boston and Maine Railroad *v.* Babcock, 3 Cush. 228; Boston and Maine Railroad *v.* Bartlett, id. 224.) From a portion of the opinion of *Shaw*, C. J. (6 Met. 353, &c.), it might be inferred that it was held, that a positive agreement on the plaintiff's part to act under the contract is not necessary, where, in the event of his acting under it, there will be a certain obligation upon him to pay a consideration; in other words, that the license to act is sufficiently supported by the promise to pay for using the license, in case he does use it; but much consideration was placed upon the character of the plaintiffs, as a public company instituted to make a great public work, and upon the fact, that acting on the agreement with the defendant, they had gone to fix a particular location for their road, and consequently were now compelled to take the defendant's land, whatever price should be exacted. The circumstance that a substantial consider-

party, it is plain that he is not entitled to the whole on that side in return for the part which he has done. But if we suppose that what the defendant has to do is equally divisible, and that a part of his obligation may be set off justly and accurately, as in proportion to the part done by the plaintiff, will the court decree so much? Here a question comes up somewhat similar to that of entirety of contract at law. A distinction of this kind has been taken, and seems to rest on sufficient foundation; if the plaintiff is none the worse for what he has done — or to use a phrase which has been applied to such a case, is *in statu quo*, and will not therefore be damaged if nothing be done by the defendant, he can claim nothing of the defendant, because he, the plaintiff, has not done all he was bound to do. But if the plaintiff has in good faith done all that he could do, and if the defendant do nothing of what he undertook, or make no compensation, or repay no money, and something of this kind can be decreed and done, and the defendant will gain, and the plaintiff sustain damage if it be not done, in such case the plaintiff would have a decree. (*u*) The question of compensation we have already considered. (*v*)

It sometimes happens that a thing is prayed for which is impossible now, but will be possible at a future time; as if there be an incapacity from age, which time will remove; or from incompleteness of interest or estate, which certain or even

ation did not need to be shown *at law*, the contract being under seal, was also adverted to. The doctrine of the common law, that mutuality is only necessary in a contract where the want of mutuality would leave one party without a valid or available consideration for his promise (*Tindal*, C. J., Arnold *v.* Mayor of Poole 4 Man. & G. 896), seems to express all the mutuality in the *agreement* of the parties — as distinguished from reciprocity of *remedy* — that equity requires as a necessary condition to a specific performance. At the same time, it must be borne in mind, that although no legal invalidity infects the contract, the enforcement of it in equity is a matter of judicial discretion; and notwithstanding there is no want of mutuality, the court will not act, if, upon all the circumstances of the case, there is danger that its interposition would not be equitable. See judgment of *Knight Bruce*, V. C., 2 Younge & C., Ch. 64. There is a class of injunction cases which are not to be used as authorities for a specific performance under like circumstances, — such as Dietrichsen *v.* Cabburn, 2 Phillips, 52. See the observation of Lord *Cottenham*, C., in the report in 10 Jur. 601. See also, Lumley *v.* Wagner, 1 De G., M. & G. 604.

(*u*) But the court will not grant specific performance of the agreement *with a variation*. In the language of Lord *Langdale*, M. R., in Nurse *v.* Seymour, 13 Beav. 269: "You may have an agreement specifically performed, but you cannot have it *quasi* specifically performed, or specifically performed with a variation."

(*v*) Section 6, p. 399, *et seq.*

probable events will cure; in such cases equity may not refuse absolutely to do what is requested, but may delay the decree until the obstacles to the performance are removed, and in the mean time, make any necessary provisions by a temporary decree. (*w*)

A court of chancery has no power to enforce specific performance against a *feme covert, in personam;* yet, if she has separate property within its jurisdiction, that may be made to answer for her contract; but in all cases, the court must proceed *in rem*, against the property. (*x*) For a *feme covert* is not competent to enter into contracts, so as to give a personal remedy against her; and although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a *feme covert* labors, though she may pledge her separate property, and make it answerable for her engagements. (*y*)

There has been much diversity of opinion in England whether specific performance should be decreed when a husband covenants that his wife shall do or permit some act which will convey away her estate or bar her right. A Master of the Rolls (*z*) said, in 1733, "there are a hundred precedents for it." But the course of adjudication was certainly not uniform. Lord *Cowper* strongly objected to it, (*a*) and Lord *Eldon*, whose conservatism led him to obey the precedents, declared that if it were a "*res integra*," he should hesitate, and stated the objections to the doctrine, or rather practice, clearly and forcibly. (*b*) We

(*w*) See Clay *v.* Rufford, 5 De G. & S. 768, 19 Eng. L. & Eq. 360.

(*x*) Aylett *v.* Ashton, 1 Mylne & C. 105; Francis *v.* Wigzell, 1 Madd. 258; Martin *v.* Dwelly, 6 Wend. 9; Knowles *v.* McCamly, 10 Paige, 342. And see Martin *v.* Mitchell, 2 Jacob & W. 424; Berry *v.* Cox, 8 Gill, 466.

(*y*) Lord *Cottenham* (when Master of the Rolls), 1 Mylne & C. 111, 112; Francis *v.* Wigzell, *ubi supra.* Where a married woman, having separate property, and living apart from her husband, entered into an agreement to take a lease, it was held, that she was bound by the contract to the extent of her separate property, and might be compelled to pay the rent. Gaston *v.* Frankum, 2 De G. & S 561. And see Stead *v.* Nelson, 2 Beav. 245. As to the enforcement of a contract with a married woman, for the purchase of her separate property, see Harris *v.* Mott, 14 Beav. 169.

(*z*) Sir *Joseph Jekyll*, in Hall *v.* Hardy, 3 P. Wms. 189.

(*a*) Otread *v.* Round, 4 Vin. Ab. Baron & Feme (H. b.), pl. 4.

(*b*) Emery *v.* Wase, 8 Ves. 514; Martin *v.* Mitchell, 2 Jac. & W. 425, 426. See opinion of *Alexander*, C. B., Frederick *v.* Coxwell, 3 Younge & J. 517. But see the judgment of *Wigram*, V. C., Downs *v.* Collins, 6 Hare, 437.

believe that the question has seldom come before the equity courts of this country. But we should think the objections to a decree of specific performance in such a case are so obvious and powerful, that no court would grant it unless very peculiar circumstances lessened the force of these objections. A decree may issue in such a case against the husband, perhaps requiring him to do what he can, with an allowance, indemnity or security, for what he cannot do; and this has been done. (*c*)

It is hardly necessary to say, that equity will not enforce a contract tainted with fraud on the part of the party applicant. (*d*) Here equity can hardly be said to follow the law, because it goes further. For it requires perfect good faith, and will refuse specific performance of a contract, if it were obtained by means of misrepresentation or indirection, which would not be sufficient to avoid the contract at law. (*e*) As if the plaintiff had

(*c*) Where a vendor's wife refused to release her dower, he was decreed to convey his own interest, with an indemnity against the claim of dower. *Williamson*, C., Paul *v.* Young, New Jersey, 1855, 4 Amer. Law Reg. 412, 2 Stockt. Ch. 401, affirmed by the Court of Errors and Appeals, *nom.* Young *v.* Paul, 2 Stockt. Ch. 414.

(*d*) If a vendor before the sale make a representation calculated to induce the purchaser to overvalue the property, which representation is untrue and known by him to be untrue, he cannot enforce specific performance of that contract of sale, although he had no fraudulent intent in the representation; for he who seeks specific performance ought to be *optimæ fidei*. Price *v.* Macaulay, 2 De G., M. & G. 339, 19 Eng. L. & Eq. 162. But it seems that the fact of the plaintiff's having, during the treaty which led to the contract, made false representations concerning the subject-matter, will not preclude him from a specific performance, if it appear that the defendant was not at all misled by such misrepresentations. Clapham *v.* Shillito, 7 Beav. 146; Vigers *v.* Pike, 8 Clark & F. 562. And see Jennings *v.* Broughton, 5 De G., M. & G. 126. Yet in order to enable a vendor to avail himself of that reply, he must show clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say, that he is to be assumed not to have spoken the truth. *Knight Bruce*, L. J., 2 De G., M. & G. 346. Where the vendor employed a puffer to bid at a sale advertised to be "without reserve," a specific performance was refused him. Meadows *v.* Tanner, 5 Madd. 34. See Thornett *v.* Haines, 15 M. & W. 372, *per Parke*, B. An industrious concealment of a circumstance affecting the value of the property, was held to be a ground for refusing a specific performance. Shirley *v.* Stratton, 1 Bro. Ch. 440. To defeat an application for a specific performance, it is not necessary that the plaintiff should have known the representation to be untrue, when he made it, if it is false in point of fact. Best *v.* Stow, 2 Sandf. Ch. 298. As to the misconduct of an agent of one of the parties, see Alvanley *v.* Kinnaird, 2 Macn. & G. 6.

(*e*) A misrepresentation, whether wilful or not, deprives the party of all title to a specific performance in equity; the contract is vitiated *in toto*, and it is not competent to the plaintiff, after exonerating the defendant from that part which is affected by the misrepresentation to obtain the specific execution of the residue. Clermont *v.* Tasburgh, 1 Jac. & W. 112; Cadman *v.* Horner, 18 Ves. 10. See also, Drysdale *v.* Mace, 5 De G., M. & G. 103; Gurley *v.* Hiteshue, 5 Gill, 223; Best *v.* Stow, 2 Sandf. Ch. 298; Powers *v.* Hale, 5 Foster, 145. And although there be no want of good faith on the plaintiff's part, yet if the defendant placed a different and erroneous construction upon the

induced the defendant to enter into a written contract, by his promise to alter it materially afterwards, or substantially qualify its operation. (*f*) So if he had orally waived a written contract under circumstances which would not amount to a legal waiver. (*g*)

And whatever his merits originally, a plaintiff may disentitle

contract, and in doing so committed a mistake which a fair and reasonable man in the circumstances might without supine ignorance or gross negligence have fallen into, that may be a reason why a court of equity should not enforce specific performance against him. *Knight Bruce*, V. C., Ricketts *v.* Bell, 1 De G. & S. 346; Higginson *v.* Clowes, 15 Ves. 524. And see Alvanley *v.* Kinnaird, 2 Macn. & G. 1. This rule was very clearly stated, and the manner of applying it carefully defined by *Shaw*, C. J., Western R. R. Co. *v.* Babcock, 6 Met. 352. See also, Malins *v.* Freeman, 2 Keen, 25; Graham *v.* Hendren, 5 Munf. 185. Young *v.* Frost, 5 Gill, 287, may be considered perhaps to conflict in some degree with this principle, and with that requiring the plaintiff to prove the contract with certainty, and also with the doctrine that parol evidence is admissible to rebut, though not to establish, an equity. In proportion to the severity of the terms imposed by one party on the other, it is incumbent on the former to see to it that those terms are explicitly stated. Thus when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions which are ambiguous and reasonably capable of misconstruction, the purchaser may generally construe them in the manner most advantageous to himself. Rhodes *v.* Ibbetson, 4 De G., M. & G. 787, 23 Eng. L. & Eq. 393. And see Drysdale *v.* Mace, 5 De G., M. & G. 103, 27 Eng. L. & Eq. 195. A much stronger case is necessary to set aside an executed contract on the ground of misrepresentation or concealment, than is sufficient to induce a court of equity to refuse a specific performance of one that is executory. See Wilde *v.* Gibson, 1 H. L. Cas. 605, and the judgment of Lord *Campbell*, id. 632. See also, Edwards *v.* M'Leay, Coop. 308, 2 Swanst. 287; Legge *v.* Croker, 1 Ball & B. 506.

(*f*) Clarke *v.* Grant, 14 Ves. 519. And see Cathcart *v.* Robinson, 5 Pet. 264. An agreement for the purchase of certain land was not enforced because it was made on the faith of representations of the vendor's agent that the vendor would do certain acts upon his adjoining property, in consequence of the non-fulfilment of which representations the land purchased was less valuable than it would otherwise have been. Myers *v.* Watson, 1 Sim. N. S. 523, 7 Eng. L. & Eq. 66. In the judgment of Lord *Cranworth*, V. C., in that case, is a good statement of the nature and extent of this equitable defence to an application for a specific execution of a contract. In a case where a plaintiff set forth an agreement in writing for the sale to him by the defendant of certain land, and also offered, in case the defendant should so elect, to accept certain parol variations of the contract which had been subsequently agreed upon, the court left it to the defendant to accept the modified agreement if he would, and upon his declining to exercise the privilege of election, decreed a specific performance of the contract as it stood. Robinson *v.* Page, 3 Russ. 114.

(*g*) Contracts in writing relating to land may be waived by parol; but this defence is to be received by a court of equity with caution; for the agreement to waive is as much an agreement relating to lands as the original agreement. Lord *Hardwicke*, C., Backhouse *v.* Mohun, 3 Swanst. 435, *n.* For what is requisite to constitute a waiver, see Robinson *v.* Page, 3 Russ. 114; Price *v.* Dyer, 17 Ves. 356. Variations, so acted upon, that the original agreement could no longer be enforced without injury to one party, would be a bar to a specific performance of that original agreement. Sir *Wm. Grant*, M. R., 17 Ves. 364. But variations orally agreed upon, are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining unaltered. Id.

himself to relief by a want of proper candor in setting the facts of the case before the court, (*h*) or even by an unreasonable and injurious delay in filing his bill. (*i*)

Indeed as equity is *never* bound to give this relief, (*j*) so it never will, unless the justice of the case, as drawn from all its facts, demand it. (*k*) Hence there must not only be an entire absence of fraud, but an equal absence of oppressiveness; (*l*) for if a decree would operate more hardly than it should on the defendant, this would be a sufficient reason for withholding it. (*m*) It is sometimes said, but not uniformly, that the intoxication of the defendant at the time of entering into the contract, is no sufficient defence, unless the plaintiff purposely procured or caused that intoxication, and took advantage of it. (*n*)

(*h*) A plaintiff who makes a wilfully untrue representation of the contract, upon failing to establish it in that form, will not be permitted to insist upon the contract as it is shown to be by the proof. "I never will," said Sir *Edward Sugden*, L. C., "execute a contract for a plaintiff one way, when with his eyes open he insists in his bill on a different construction against good faith. If he undertakes to perpetrate a fraud and fails, I shall take care that he fails altogether, and does not obtain the aid of the court at all." Molloy *v.* Egan, 7 Irish Eq. 590, 593. And see Warren *v.* Thunder, 9 Irish Eq. 371, 376.

(*i*) Watson *v.* Reid, 1 Russ. & M. 236; Heaphy *v.* Hill, 2 Sim. & S. 29. So if the plaintiff, after filing his bill, is guilty of laches in neglecting to prosecute it for a long space of time. Moore *v.* Blake, 1 Ball & B 62. As to the defence of the statute of limitations, see Dugan *v.* Gittings, 3 Gill, 138.

(*j*) *Vide ante*, sect. 1.

(*k*) "I take it to be an established principle of this court not to decree a specific performance of an agreement unless it appears that the party who calls for this peculiar aid of the court has acted not only fairly, but in a manner clear of all suspicion. If there be a reasonable doubt upon the transaction, the court will leave the party to his legal remedy for the non-performance of the contract." Lord *Manners*, L. C., O'Rourke *v.* Percival, 2 Ball & B. 62. And see Mason *v.* Armitage, 13 Ves. 37. But that the defendant, being vendee, will be the loser by the bargain, by reason of a circumstance seriously affecting the property of which he was unaware, e. g. the existence of a nuisance in the neighborhood, is not, it seems, a ground for refusing the vendor a specific performance. 1 Sugd. V. & P. ch. 7, § 4; Lucas *v.* James, 7 Hare, 410. "Otherwise, perhaps, if the defect be known to the vendor, and be one which a provident purchaser could not discover." *Wigram*, V. C., 7 Hare, 418.

(*l*) Brogden *v.* Walker, 2 Harris & J. 285. Where the defendant is a man in an inferior position and without professional assistance, and is induced to make a bargain which a better knowledge of the circumstances would have prevented his making, the court may refuse to compel a specific performance. Stanley *v.* Robinson, 1 Russ. & M. 527.

(*m*) See Wood *v.* Griffith, 1 Swanst. 54, 55. An agreement containing a stipulation inadvertently inserted was not enforced. Watson *v.* Marston, 4 De G., M. & G. 230, 31 Eng. L. & Eq. 167. But a court of equity will not refuse a specific performance, because the contract was an improvident one on the part of the defendant. Sullivan *v.* Jacob, 1 Molloy, 472. And on an application for a specific performance, resisted on the ground that it was a case of hardship, Lord *Eldon* held, that unless hardship arises to a degree of inconvenience so great that the court can judicially say such could not be the meaning of the parties, it cannot influence the decision. Prebble *v.* Boghurst, 1 Swanst. 329. Compare Kimberley *v.* Jennings, 6 Sim. 344, 352.

(*n*) Shaw *v.* Thackray, 1 Smale & G. 537, 23 Eng. L. & Eq. 18; Lightfoot *v.*

Although a specific performance is not always denied because the plaintiff has lost an adequate remedy at law by his own neglect; (*o*) yet where he has permitted the rights of the parties under the contract to be passed upon in an action at law at a time when he might have sought the interposition of equity, a strong case will be required to induce a court of equity to assume jurisdiction of the matter. (*p*)

A court of equity will never enforce performance of a contract which is illegal or against the policy of the law. (*q*) But this

Heron, 3 Younge & C. Ex. 586; Reinicker *v.* Smith, 2 Harris & J. 423. But *total* drunkenness, or a degree of intoxication depriving the party of the use of his reason, avoids any *express* contract, both at law and in equity. Gore *v.* Gibson, 13 M. & W. 623. Sir *William Grant*, M. R., Cooke *v.* Clayworth, 18 Ves. 16; Sir *Edward Sugden*, L. C, Nagle *v.* Baylor, 3 Drury & W. 65; *Stuart*, V. C., 1 Smale & G. 539; Barrett *v.* Buxton, 2 Aikens, 167; Prentice *v.* Achorn, 2 Paige, 30; Wigglesworth *v.* Steers, 1 Hen. & M. 70. See Clark *v.* Caldwell, 6 Watts, 139, a decision under a statute. Duncan *v.* M'Cullough, 4 S. & R. 483. And wherever a party has entered into a contract in a state of intoxication, a court of equity is averse to enforcing it, although the plaintiff did not make him drunk, and took no unfair advantage of his situation; in such cases the court, generally speaking, does not act on either side — it will not require the sober party to give up his contract, as it would do if he had been guilty of unfair practice, nor will it assist the other to get rid of the legal obligation of his agreement merely because he was intoxicated when he assumed it. Cooke *v.* Clayworth, 18 Ves. 15; Nagle *v.* Baylor, 3 Drury & W. 64, 1 Sugd. V. & P. ch. 4, § 3, pl. 34. Lord *Langdale*, M. R., Malins *v.* Freeman, 2 Keen, 34. It seems that a family compromise, reasonable in its terms (being one of a class of agreements particularly favored in equity), may be enforced against a party who was drunk at the time he entered into it. Lord *Eldon*, Ch., Stockley *v.* Stockley, 1 Ves. & B. 31. Upon the subject of intoxication, see also, Say *v.* Barwick, 1 Ves. & B. 195; Rutherford *v.* Ruff, 4 Desaus. 350. And see *ante*, vol. 1, p. 384.

(*o*) Davis *v.* Hone, 2 Sch. & L. 347; Lennon *v.* Napper, 2 Sch. & L. 684.

(*p*) After a vendee had brought an action, and recovered judgment against the administrator of the vendor for the breach of the contract in not making the conveyance at the day stipulated, which fell after the death of the vendor, it was held, that it was no longer competent to the administrator to maintain a bill against a purchaser and the heirs for the specific performance of the contract. Moore *v.* Randolph, 6 Leigh, 175.

(*q*) Strange *v.* Brennan, 15 Sim. 346; Abbott *v.* Stratten, 3 Jones & La. T. 616. St. John *v.* Benedict, 6 Johns. Ch. 111, an agreement for the purpose of defrauding creditors. See Webb *v.* Direct London and Portsmouth Railway Co., 1 De G., M. & G. 525; with which, however, compare Hawkes *v.* Eastern Counties Railway Co., 1 De G., M. & G. 757–760. See Daly *v.* Duggan, 1 Irish Eq. 311. See Johnson *v.* Shrewsbury and Birmingham Railway Co., 3 De G., M. & G. 914, a case of a contract between a railway company and private persons, by which the latter were to run the trains and perform the operations of the railway generally for a term of years. Among the features which were questioned by *Knight Bruce*, L. J., was a stipulation that the contractor should not be liable for injuries to passengers, beyond a specified sum for each death or other injury occurring on the road. If the agreement, as stated in the pleadings, do not appear illegal, but circumstances come out in the evidence, tending to show that it is in fact tainted with illegality, it is proper for the court to direct an inquiry into the matter. Parken *v.* Whitby, Turner & R. 366. It seems that an agreement by A, that all the property of which he should be possessed at the time of his death should be held by his heirs and personal representatives in trust for the use of B, ought not to be specifi-

rule is construed with liberality, and if the plaintiff have real equities, the court will not be indisposed to seize hold of special circumstances to exempt the case from its operation. (*r*)

cally executed; for if a party could so contract for a certain sum as to deprive himself of the possibility of realizing property over which he can have a disposing power by will, the effect would be to destroy one of the strongest motives for bettering his condition in life. Hill *v.* Gomme, 5 Mylne & C. 250, 253. See Mandorff *v.* Kilbourn, 4 Md. 459. With respect to an agreement between partners, that one on retiring from the business shall permit the other to carry on business in his name, see Thornbury *v.* Bevill, 1 Younge & C., Ch. 554, 565. It appears that an agreement for the sale and purchase of the business of an *attorney*, whose name is to be continued to be held out as engaged in it, is not such a contract as a court of equity ought to execute. Bozon *v.* Farlow, 1 Meriv. 459. As to agreements in restraint of trade, see Bryson *v.* Whitehead, 1 Sim. & S. 74. As to a private arrangement for withdrawing opposition to a bill in Parliament, see Shrewsbury & Birmingham Railway Co. *v.* London & North-western Railway Co. 2 Macn. & G. 324. Specific performance may be decreed of articles of separation between husband and wife. Wilson *v.* Wilson, 1 H. L. Cas. 538, 31 Eng. L. & Eq. 29. See further with respect to arrangements altering the relation which the law establishes between husband and wife, Jodrell *v.* Jodrell, 2 Beav. 45; Wallingsford *v.* Wallingsford, 6 Harris & J. 489. As to the distinction between enforcing illegal contracts and asserting title to money which has arisen from them, see Sharp *v.* Taylor, 2 Phillips, 816-818.

(*r*) The case is sometimes presented where the agreement, as originally entered into, comprehends illegal as well as legal stipulations, and the plaintiff applies to the court to enforce the legal part, rejecting that which is contrary to law; and the question thus raised is often one of great difficulty. It may be supposed that a court of equity, in the exercise of its discretionary jurisdiction, will not be as ready as a court of law to pick out the materials of a valid contract from an admixture tainted with illegality; for the party has still his remedy at law open to him, and he cannot bring a perfect equity when he admits that his purpose in the beginning was to accomplish something that was contrary to law. Yet if the illegal stipulations were introduced without his fault, or much less by his fault than by that of the other party, it is possible for him to have a standing in equity. Carolan *v* Brabazon, 9 Irish Eq 224, 3 Jones & La T. 200, an interesting case on this subject, was an application by a tenant for the specific performance of an agreement for a lease. The agreement was drawn by the defendant himself; who also in the subsequent proceedings had acted vexatiously, and in an unfair and litigious spirit. The unobjectionable terms of the contract were stated explicitly; but the illegal provision (namely, that the tenant was to bear certain poor-law rates, tithe-rent, &c.), was prefaced with the words, "with the understanding that." The decision went off on the ground that a lease had been actually drawn by the defendant's solicitor, carrying out the valid part of the agreement; under which lease, though not executed by the defendant, the plaintiff had entered and paid rent. Without the consent or knowledge of the defendant, the term in the lease, as drawn, was longer by one life than was stipulated in the agreement, and therefore it was reformed by the court in this respect, so as to comply with the original terms. But this amendment being made, it was treated as a substitute for, or execution of, the agreement. In dealing with the case upon this state of facts, the Lord Chancellor, who before coming to a decision had vainly appealed to the defendant to save him the necessity of meeting the main difficulty in the case, made the following observations: "Then there is a question as to the poor-rate. It is said that this agreement is contrary to the Act of Parliament. So I think it is. But even if I had to deal with the case in an abstract point of view, I am not prepared to say that I should not have given a decree for specific performance. If parties choose to enter into a contract which is legal to a certain extent, to which it is to be executed by an actual lease, and stipulate for something beside, which is to rest on understanding, which is not *malum in se*, but merely prohibited, I am not prepared to say, that in such a case, I should not decree a specific per-

A recent act of the British Parliament, passed in 1854, and known as The Common Law Procedure Act, gives two new proceedings, or, as they are sometimes called, two new actions, to the courts of common law — the action of mandamus and the action of injunction. These words are old, but the remedies are wholly new. By the first, it is intended to enable a plaintiff to compel a defendant, not merely to pay damages for a breach of duty, for that the law did before, but to *perform* any duty in the fulfilment of which the plaintiff is personally interested. Damages may be given also; and judgment may be given for the plaintiff, "that a mandamus do issue, and it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced." And this writ will have the same force as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment. Of the action of "injunction," the intention is to enable a plaintiff "to prevent the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of like kind arising out of the same contract, in relation to the same property or right." Here, too, damages may also be given, and proper writs issued, analogous to those above mentioned in the action of mandamus.

Not enough of adjudication upon these new actions has yet been reported to illustrate them much. It seems, however, to be thought by the profession, that they are intended only to enable the courts of common law to give equity relief in certain cases, in a cheap and summary way, without the delay and cost of sending the case into chancery. Even if this be all, something might be gained by similar provisions in this country, although our courts of equity and law are not so widely separated as

formance so far as the contract is legally capable of execution. What, then, would be the effect of my decree? Simply to do what the parties intended. They intended that what was legal should be inserted in the lease, but that what was not legal should not be in the lease. Therefore, I should execute the contract precisely in the form which the parties intended."

those in England, and equity relief does not here cost so much of money or of time, as there.

SECTION VIII.

OF TRUST MORTGAGES, SO CALLED.

Among the contracts which come before courts having equitable jurisdiction, for relief, are those which are familiarly known as trust mortgages. (*s*) Although this name is commonly given to them both within and without the legal profession, and sometimes by courts, (*t*) we cannot regard them as mortgages, but as trusts created to be substitutes for mortgages, and to accomplish the principal purpose of a mortgage, by means better suited, than a mortgage would be, to the wishes of the parties, or the circumstances of the case.

What are called trust mortgages exist sometimes between individual parties. If a borrower is willing to give to the lender, or a debtor to the creditor, the security of his real estate or other property, but is, for any reason, unwilling to give to the lender or creditor the title to, and management of, the property, he transfers it to a third party, to hold in trust. The deed, or a connected document, declares and defines the trusts. Usually they are, to hold the property, and reconvey the same to the original owner, if he pays the debt, or performs the agreement, to secure which the instrument is made; if he fails to do this, the trustee is to sell the property, and pay over to the creditor whatever part of the proceeds may be needed to pay what is due to him. And the time and method of sale, and the application of the proceeds, are specified, and sometimes with much minuteness.

A more important use to which these contracts are applied is that of securing the debts or bonds of a corporation (a rail-

(*s*) This subject is fully treated in 1 Washburn, Real Property, 2d ed. p. 531.

(*t*) Sargent *v.* Howe, 21 Ill. 149; Woodruff *v.* Robb, 19 Ohio, 212; Hannah *v.* Carrington, 18 Ark. 85.

road company, for example); and for this purpose the property, real and personal, and the franchise of the company, are conveyed to trustees, to be held and applied as security for the debts or bonds of the company; and these debts or bonds may be either then existing, or to exist in future. (*u*)

It may be said that there are two essentials of a mortgage, — one, the equity of redemption in the mortgagor, which is subject to attachment or levy by a creditor; the other is, the power of foreclosing by peaceable possession, for breach, or by a suit at law. In the contract we are considering, there is, undoubtedly, in the original transferer, a valuable interest, which may be called a right of redemption; and it is this which is transferred to a second set of trustees, and sometimes again to a third set, to secure a second or a third set of creditors. Then these transfers would be commonly called first, second, and third mortgages. But it has been distinctly held, that the original owner has no equity of redemption which is liable to attachment or execution. (*v*)

As to the foreclosure, the authorized sale is intended to operate, to some extent, as a foreclosure. But it is also distinctly held, that while a court of equity will enforce this sale, in accordance with the terms of the trust, and have power to do this by virtue of their equity jurisdiction in cases of trust, even in States where they have no power to decree sales under mortgages, (*w*) they have no power to depart, in the sale or the manner of it, from the specified terms of the contract; and there does not belong to this contract any right or power of foreclosure whatever, at law or in equity, other than that springing from its terms. (*x*)

It has been said, that if the trust for the benefit of a creditor must be executed by a third person, and cannot be by the cred-

(*u*) Ashhurst *v.* Montour Iron Co. 35 Penn. St. 30.

(*v*) Pettit *v.* Johnson, 15 Ark. 55; McIntyre *v.* Agricultural Bank, 1 Freem. Ch. 105; Morris *v.* Way, 16 Ohio, 469.

(*w*) Koch *v.* Briggs, 14 Cal. 256; Bradley *v.* Chester Valley R. R. Co. 36 Penn. St. 141; Sampson *v.* Pattison, 1 Hare, 533; Reece *v.* Allen, 5 Gilm. 236; Newman *v.* Jackson, 12 Wheat. 572; Brisbane *v.* Stoughton, 17 Ohio, 482; Brown *v.* Bartee, 10 Sm. & M. 275; Marvin *v.* Titsworth, 10 Wis. 320; Pettit *v.* Johnson, *supra.*

(*x*) Ashhurst *v.* Montour Iron Co. *supra*; Koch *v.* Briggs, *supra*; Wilson *v.* Russell, 13 Md. 494; Bradley *v.* Chester Valley Co. *supra.*

itor, it is a trust, and not a mortgage, but is a mortgage if the creditor himself can execute the trust. (*y*)

The trustee may make the sale under the terms of the trust, without an order of court; if he refuses to do so, the court may order it done. (*z*) And if one or more trustees die or resign before the trust is executed, the trust survives, and the surviving trustees may execute it. (*a*)

These contracts, although of comparatively recent introduction, have already passed repeatedly under equity adjudication. The courts regard them as trusts, and exercise, in relation to them, whatever equity powers they have in cases of trust. If the trustee accepts and holds the property, he is held as trustee, although he does not sign the deed. The trust does not, however, exist between the debtor and the creditors, but between the debtor and his transferee in trust; and then between this transferee, thus made trustee, and the creditors for whose benefit the transfer was made. (*b*)

We are willing to accept the common name of trust mortgages, as sufficiently accurate for use, because we regard it as an abbreviated form of "trusts in substitution of mortgages."

(*y*) Marvin *v.* Titsworth, *supra.*

(*z*) Bradley *v.* Chester Valley R. R. Co. *supra;* Leffler *v.* Armstrong, 4 Iowa, 482.

(*a*) Hannah *v.* Carrington, *supra;* Peter *v.* Beverly, 10 Peters, 565; Franklin *v.* Osgood, 14 Johns. 527.

(*b*) Wilson *v.* Russell, Koch *v.* Briggs, Bradley *v.* Chester Valley R. R. Co., Ashhurst *v.* Montour Iron Co., all cited in previous notes to this section.

CHAPTER XII.

ON BANKRUPTCY AND INSOLVENCY.

Sect. 1. — *The General Purpose of Bankrupt Laws.*

THE common law did not resort to imprisonment as a means of enforcing payment of debts. The process against mere debtors, or defendants charged with injuries without force, beginning with the *præcipe*, which was only a command, and following this by a *pone*, which was an attachment to require his appearance in court, was completed and exhausted by the *distringas*, or distress infinite, which authorized the sheriff to take the goods of the defendant and the profits of his lands. But the courts permitted a fiction of law, by which the defendant, being charged with a breach of the peace, a *capias ad respondendum* issued at once, and after judgment, a *capias ad satisfaciendum.* (*a*) But England could make no great progress in commerce and business without perceiving the necessity of something more than this; and after some earlier statutes relating principally to foreigners, in 34 Henry VIII. (1543), an act was passed which may be considered the first English act of bankruptcy. (*b*) And this, followed by 13 Elizabeth, ch. 7,

(*a*) 3 Bl. Com. 279; Harbert's Case, 3 Rep. 12.

(*b*) With regard to the derivation of the word bankruptcy, though not perhaps essential to the present discussion, it may be observed that high authorities are in conflict upon it. Mr. Justice Blackstone, in his Commentaries, vol. 3, p. 471, derives it from the word *bancus* or *banque*, which means the table or counter of a tradesman, and *ruptus*, broken, denoting thereby one whose shop or place is broken and gone. Sir Edward Coke, on the other hand, more metaphorically and quaintly makes the derivation from the two French words *banque* and *route*, which last word, he says (4 Inst. 277), means "a sign or mark, as we say a cart-rout, which is the sign or mark where the cart hath gone; so, metaphorically, it is taken for him that hath wasted his estate and removed his *banque*, so that there is left but a mention thereof." The meaning of the term has been so often passed upon by courts and legislatures, that it becomes a question of little practical importance at this day. Yet, in favor of Mr. Justice *Blackstone's* derivation, it may be said that it seems more simple and appropriate, and has unquestionably met with a more de-

(1571), and 21 Jac. I. ch. 19 (1624), laid the foundations of the system now existing in England, and of our own, so far as it is derived from that. (*c*)

How the common-law lawyers looked upon this whole thing, may be inferred from the language of Coke. He says: "We have fetched the name as well as the wickedness of bankrupts from foreign nations. . . . . In former times, as the name of a bankrupt, so was the offence itself, a stranger to an Englishman. . . . . Neither do we find any complaint in parliament, or any act of parliament made against any English bankrupt until . . . the English merchant, had rioted in three kinds of costlinesses, namely, costly building, costly diet, and costly apparel, accompanied with neglect of his trade and servants, and thereby consumed his wealth." (*d*)

We need not, however, impute the necessity of a bankrupt law in England to the increase of her iniquity, but to the growth of a commercial prosperity which far outstripped the efficiency or adequacy of the common law, of which all the principles

cided measure of subsequent approval than the other. Further, it accords with the custom which formerly obtained among the bankers of Italy, who used to carry on their business in the public places, seated on forms, with benches to count their cash upon, and of whom if any one became insolvent, his *bench* was *broken*, either as a mark of infamy, or to put another in its place. 1 Beawes' Lex Mercatoria, 371. The title, however, of the first English statute upon this subject, relating to English debtors (34 & 35 Henry VIII. c. 34), might well have suggested to Lord *Coke* the view he adopted. It was "against such as do make bankrupt," which is but a literal translation of the French idiom, "*qui font banque route.*" *Story*, J., in Everett *v.* Stone, 3 Story, 453.

(*c*) These were the most important statutes on this subject in the earlier days of the bankrupt law. They were followed by numerous others, varying and enlarging the powers of the courts of bankruptcy, and specifying the acts of bankruptcy and various rules of practice. These statutes are not enumerated here, as being of no practical utility, but will be found in the collection of the Statutes at Large. They are twenty-one in number, and were all repealed by the first clause of the important statute of 6 Geo. IV. c. 16. This statute made material alterations in the law of bankruptcy, and embraces almost every branch and division of the former bankrupt laws. The persons liable to become bankrupt are increased in number and more particularly defined; new modes of committing an act of bankruptcy specified; the Lord Chancellor is invested with greater powers for working or superseding the commission, and for saving expense to the various parties interested in the bankrupt's estate; and fuller powers of examination and discovery are conferred upon the commissioners. Subsequent to the passage of this important statute, ten statutes of amendment and alteration were enacted, two in the reign of William IV. and eight in that of Victoria, until by the statute 12 & 13 Vict. c. 106, entitled, "An Act to amend and consolidate the Laws relating to Bankrupts," consisting of two hundred and seventy-eight sections, all previous laws on the subject were repealed, and their principles embodied, with little alteration in the repealing act. This last statute bears date August 1st, 1849. We are aware of no subsequent amendments of importance.

(*d*) 4 Inst. 277.

were determined, and most of the processes adopted, under very different circumstances and exigencies. The common law knows but two parties, the plaintiff and defendant; between them it can do justice; but if the relations between these two are complicated with the rights of third parties, the common law has very inadequate power. One effect of this principle is, that if a debtor pays any one creditor in full, the law asks nothing as to how this payment affects other creditors. And if any creditor resorts to law to obtain payment of his debt, the law lends him all its instruments, without any inquiry into the effect of such payment upon the ability of the debtor to satisfy other creditors whose claims are equally just and urgent. In other words, the common law permits a preference among the creditors, without any limit or any other direction than may be given to it by the pleasure of the debtor, or the haste or good fortune of the creditor. (*e*)

(*e*) The cases upon this subject seem to be of two classes: first, when the payment is made directly by the insolvent to the creditor; second, when this is effected through the medium of trustees, by assignment. The right of the debtor to pay any creditor he pleases from funds in his possession, seems to be clear, in the absence of statutory prohibition. Clark *v.* White, 12 Pet. 178; Tompkins *v.* Wheeler, 16 id. 106; Buffum *v.* Green, 5 N. H. 71; Tillou *v.* Britton, 4 Halst. 120; Stover *v.* Herrington, 7 Ala. 142; Johnson *v.* Whitwell, 7 Pick. 71; Widgery *v.* Haskell, 5 Mass. 144; Hatch *v.* Smith, 5 Mass. 42; *Ex parte* Conway, 4 Ark. 302; Ford *v.* Williams, 3 B. Mon. 550; Mackie *v.* Cairns, Hopkins, 373; Hendricks *v.* Mount, 2 Southard, 743; Blakey's Appeal, 7 Barr, 449; Wakeman *v.* Grover, 4 Paige, 23. In the case of Hopkins *v.* Grey, 7 Mod. 139, it was held, by Lord *Holt*, that if a banker or goldsmith who has many people's money refuse payment, yet keep his shop open, and as often as he is arrested give bail, he may by that means give preference of payment to his friends; and when he has done, if he run away, yet such payment shall stand against a commission of bankruptcy. Cock *v.* Goodfellow, 10 Mod. 489. The later English cases adopt the same view when the payment had been made on pressure by the creditor, and is without a view to fraudulent preference in contemplation of bankruptcy. Cook *v.* Pritchard, 6 Scott, N. R. 34, 5 Man. & G. 329; Ogden *v.* Stone, 11 M. & W. 494; Kynaston *v.* Crouch, 14 id. 266; Green *v.* Bradfield, 1 Car. & K. 449. A similar doctrine, under the late National Bankrupt Law of the United States, was adopted in Ogden *v.* Jackson, 1 Johns. 370; Phenix *v.* Ingraham's Assignees, 5 id. 412. This topic will be further considered in a subsequent part of this chapter. The case of Wall *v.* Lakin, 13 Met. 167, was decided upon the Mass. Stat. of 1841, and the doctrine was maintained, that this case of payment in money of an existing debt by an insolvent debtor, is not among the cases embraced within the provisions of § 3 of the statute. Mr. Justice *Dewey*, delivering the opinion of the court, said: "It was strongly urged upon us at the argument, that it was against the whole policy of the insolvent laws thus to allow a payment to an individual creditor to be retained by him to his own use. If we look merely at the principle of equitable distribution of the whole assets among all the creditors *pro rata*, it would seem to be in derogation of that principle. But there are other principles favoring the construction we have given. A different rule might be found to operate with great practical inconvenience, in its application to payments made in the usual course of

This is certainly opposed to the true principles of commercial policy, if not to natural justice. And we have no hesitation in

business. Many cases occur of traders and other persons who do business, while there is a strong public impression that if their debts were at once all demanded, there might not be assets sufficient to pay them, yet who continue to pay such debts as are most strongly pressed, hoping to survive their embarrassments, and by better success in business eventually to discharge their whole indebtedness. Whether it would be sound policy to disturb such payments may certainly be somewhat questionable." United States *v.* Bank of United States, 8 Rob. (La.), 262. With regard to the other class of cases of preference, where an assignment is made to trustees, the doctrine may be said to be, in the absence of statutory prohibition, that such an assignment, when absolute and unconditional, containing no reservation or condition for the benefit of the debtor, and made under such circumstances as not to extort from the fears or apprehensions of the creditors an absolute discharge as a consideration for a partial dividend, will be valid. In this note we cite the most important cases to be found in the books, where the subject of assignments for benefit of creditors is considered: Williams *v.* Jones, 2 Ala. 314; Hindman *v.* Dill, 11 id. 689; Webb *v.* Daggett, 2 Barb. 9; Wilt *v.* Franklin, 1 Binn. 502, 514; Lippincott *v.* Barker, 2 id. 174; Lord *v.* Brig Watchman, 8 Am. Jur. 284; Rankin *v.* Lodor, 21 Ala. 380; White *v.* Banks, id. 705; Mackie *v.* Cairns, 5 Cowen, 547; De Forest *v.* Bacon, 2 Conn. 633; Ingraham *v.* Wheeler, 6 id. 277; Wintringham *v.* Lafoy, 7 Cowen, 735; Stewart *v.* Spencer, 1 Curtis, 157; Spies *v.* Joel, 1 Duer, 669; Burd *v.* Smith, 4 Dallas, 85; Moore *v.* Collins, 3 Dev. 126; Vernon *v.* Morton, 8 Dana, 247; Sheppards *v.* Turpin, 3 Gratt. 372; Canal Bank *v.* Cox, 6 Greenl. 395; Hickley *v.* F. & M. Bank, 5 Gill & J. 377; Maryland *v.* Bank of Md., 6 id. 205; Cole *v.* Albers, 1 Gill, 412; McCall *v.* Hinkley, 4 id. 128; Ramsdell *v.* Sigerson, 2 Gilman, 78; Tillou *v.* Britton, 4 Halst. 120; Niolon *v.* Douglass, 2 Hill, Ch. 443; Stevenson *v.* Agry, 7 Ham. pt. 2, 247; Repplier *v.* Orrich, id. 246; Harshman *v.* Lowe, 9 id. 92; Hendricks *v.* Robinson, 2 Johns. Ch. 283, *Kent*, C. J.; M'Nemony *v.* Ferrers, 3 Johns. 71, 84, *Van Ness*, J.; Wilkes *v.* Ferris, 5 id. 335; Hyslop *v.* Clarke, 14 id. 458, *Van Ness*, J.; Murray *v.* Riggs, 15 id. 571, *Thompson*, C. J.; Hafner *v.* Irwin, 1 Ired. 490; Allmand *v.* Russell, 5 Ired. Eq. 183; Eastman *v.* McAlpin, 1 Kelly, 157; Cameron *v.* Scudder, id. 204; M'Cullough *v.* Sommerville, 8 Leigh, 415; Halsey *v.* Whitney, 4 Mason, 206; Lawrence *v.* Davis, 3 McLean, 177; Hatch *v.* Smith, 5 Mass. 42; Widgery *v.* Haskell, id. 144; Pearson *v.* Rockhill, 4 B. Mon. 296; Marshall *v.* Hutchinson, 5 B. Mon. 305; Moffat *v.* M'Dowall, 1 McCord, Ch. 434; Buffum *v.* Green, 5 N. H. 71; Haven *v.* Richardson, id. 113; Atkinson *v.* Jordan, 5 Ham. 293; Brashear *v.* West, 7 Pet. 608; Clark *v.* White, 12 id. 178; Tompkins *v.* Wheeler, 16 id. 106; Russell *v.* Woodward. 10 Pick. 407; Foster *v.* Saco Manuf. Co., 12 id. 451; Nostrand *v.* Atwood, 19 id. 281; Beckwith *v.* Brown, 2 R. I. 311; Smith *v.* Campbell, Rice, 352; Layson *v.* Rowan, 7 Rob. (La.), 1; Dockray *v.* Dockray, 2 R. I. 547; Cameron *v.* Montgomery, 13 S. & R. 128; Robinson *v.* Rapelye, 2 Stew. 86; Richards *v.* Hazzard, 1 Stew. & P. 139; Brown *v.* Bartee, 10 Smedes & M. 268; Cross *v.* Bryant, 2 Scam. 36; Howell *v.* Edgar, 3 id. 417; Hall *v.* Denison, 17 Vt. 310; How *v.* Camp, Walk. Ch. 427; Marbury *v.* Brooks, 7 Wheat. 556; Spring *v.* S. Car. Ins. Co., 8 id. 268; Brooks *v.* Marbury, 11 id. 78; Pearpoint *v.* Graham, 4 Wash. C. C. 232; United States *v.* King, Wallace, 13; Grover *v.* Wakeman, 11 Wend. 187. In England, Estwick *v.* Caillaud, 5 T. R. 420; Nunn *v.* Wilsmore, 8 id. 521; Small *v.* Oudley, 2 P. Wms. 427; Cock *v.* Goodfellow, 10 Mod. 489. It is, however, to be borne in mind, that in most of the States the common-law privilege is taken away, and such preferences forbidden by statute. The validity of assignments, not to a third person in trust, but directly to the creditor, by way of payment or security, was maintained in several of the above cases, and in Ford *v.* Williams, 3 B. Mon. 550; Stover *v.* Herrington, 7 Ala. 142; Bruce *v.* Smith, 3 Harris & J. 499; King *v.* Trice, 3 Ired. Eq. 568; Stevens *v.* Bell, 6 Mass. 339; Johnson *v.* Whitwell, *Wilde*, J., 7 Pick. 71; Bates *v.* Coe, 10 Conn. 280; Waters *v.* Comly, 3 Harring. 117; Davis *v.* Anderson, 1 Kelly, 176; Leitch *v.* Hollister, 4 Comst. 211; Fasset *v.* Traher, 20 Ohio, 540. In the following cases,

saying so, although the great commercial State of New York still, to a considerable degree, permits this preference; that is, it still permits any debtor to pay whom he will, and on what terms he will, although, by paying some more or all, he compels himself to pay others less or none; that is, it permits this preference, and makes the payments valid, only preventing the insolvent who uses this privilege from obtaining his discharge. The mischiefs of this permission of preference are very great and very obvious; and experience — through which most of our States have passed — proves them to be those which theory would indicate. Such a preference always works injustice. It may only carry into effect a previous bargain or confidence; it may only pay a debt which it was agreed or understood should be paid at all events, whether others were or not; but this bargain, or confidence, was itself unfair. It introduces into the complications of trade new elements of disturbance and jealousy, and new temptation to get the better of one's neighbor, by secret agreement, or haste or contrivance. It induces an insolvent to go on in business as long as he has enough to pay finally those who help him, because he can only fail at last, and his endeavor to put off the evil day, makes it no worse when it comes. In a word, it is a most injurious principle, because it promises and it gives facilities and success to fraud. (*f*)

the transfer was by the voluntary confession of a judgment: Wilder *v.* Winne, 6 Cowen, 284; Williams *v.* Brown, 4 Johns. Ch. 682; Blakey's Appeal, 7 Barr, 449. In Holbird *v.* Anderson, 5 T. R. 235, a preference was effected in this manner, and Lord *Kenyon* said: "There was no fraud in this case. The plaintiff was preferred by his debtor, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which I see no illegality or injustice." It need hardly be observed, that in all the above cases, the right to make assignments for the *equal benefit of all creditors* is fully admitted, unless such assignments are prohibited by statute.

(*f*) In the case of Riggs *v.* Murray, 2 Johns. Ch. 565, Chancellor *Kent*, though reluctantly admitting the doctrine which is sustained by the numerous authorities in the preceding note, strongly set forth the dangerous tendency of such a doctrine. That was a case where an assignment had been made by a debtor of all his property in trust, to pay the trustees and such other creditors as the debtor, in one year by deed, might direct and appoint, and reserving a power to appoint new trustees, and to revoke, alter, add to, or vary the trusts, at his pleasure The Chancellor, while pronouncing this assignment, with such reservations, void, went on to say: "As we have no bankrupt system, the right of the insolvent to select one creditor and to exclude another is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored. Creditors, out of view, and who reside abroad or at a distance, are usually neglected. This checks confidence in dealing, and hurts the credit and char-

The principle of the bankrupt and insolvent laws is diametrically opposite to this, and endeavors to prevent or to cure the very mischiefs which the principle of preference causes. It is indeed almost expressed by the phrase, "*æs alienum*," which was very generally used in the Roman civil law, to signify debt. It holds the property of a debtor not to be his own, but, to the amount of the debt, it is "*æs alienum*," or the money of another. (*g*) And if he owes more than he can pay, all his property belongs to all his creditors; not to any one more than

acter of the country. These partial assignments are no doubt founded, in certain cases, upon meritorious considerations. Yet the temptation leads strongly to abuse and to the indulgence of improper motives. The Master of the Rolls, in Small *v.* Oudley, 2 P. Wms. 427, and the Lord Chancellor in Cock *v.* Goodfellow, 10 Mod. 489, admit that such preferences by a sinking debtor may, and in some cases ought to be given, and are called for by gratitude and benevolence; yet at the same time it is acknowledged, that the power may be abused, and be rendered subservient to fraud. Experience shows, that preference is sometimes given to the very creditor who is the least entitled to it, because he lent to the debtor a delusive credit, and that too, no doubt, under assurances of a well grounded confidence of priority of payment, and perfect indemnity in case of failure. How often has it happened, that that creditor is secured who was the means of decoying others, while the real business creditor, who parted with his property on liberal terms, and in manly confidence, is made the victim! Perhaps some influential creditor is placed upon the privileged list, to prevent disturbance, while those who are poor, or are minors, or are absent, or want the means or the spirit to engage in litigation, are abandoned." In Burd *v.* Smith, 4 Dall. 76, *Brackenridge*, J., said: "It has been said that a debtor may favor particular creditors. The right has been allowed, perhaps on a principle of humanity; or in favor of just debts, to exclude debts in law not strictly *ex debito justitiæ*. But I do not think that the practice is to be encouraged. It is calculated to create confusion, uncertainty, and collusion. I see nothing that will prevent the mischiefs of voluntary settlements and conveyances, but a general declaration that they are all void as against creditors." In Cunningham *v.* Freeborn, 11 Wend. 240, Mr. Justice *Nelson*, earnestly enters a protest against the doctrine of preference of creditors. So also, *Wilde*, J., in Pingree *v.* Comstock, 18 Pick. 46; *Wright*, J., in Atkinson *v.* Jordan, 5 Ohio, 293. The inadequacy of the common law to cases like these, and considerations in the nature of those advanced in 2 Johns. Ch. 565, have induced the adoption of provisions in the insolvent laws of many States, suppressing altogether assignments with preferences, or preferences of creditors, even without assignment. Of these provisions, those of the Massachusetts insolvent law of 1838 and 1841, may serve as an illustration. In § 10 of the law of 1838, it is said, that "if, after this act shall go into operation, a debtor shall, in contemplation of his becoming insolvent, and of obtaining a discharge under the provisions of this act, make any payment, or any assignment, sale, or transfer, either absolute or conditional, of any part of his estate, with a view to give a preference to any creditor, or to any person who is or may be liable as an indorser or surety for such debtor, or to any other person who has or may have any claim or demand against him." It is further provided, in the same section, the money so paid the preferred creditor may be recovered by the assignees, for the use of the other creditors. The 3d section of the act of 1841 contains even more stringent provisions upon this subject. A similar prohibition will be found in the English statute 12 & 13 Vict.

(*g*) "*Debitor itaque æs alienum contrahere dicitur . . . quia æs quod accipit, quodve contrahit, alienum, id est creditoris, fuit.*" Struvii Syntagma Jurisprudentiæ, p. 1002, note B (edition 1718). See also, Æes, in Gesner's Thesaurus.

to any other; but to all alike, without reference to his wishes or their efforts; and by a process similar to the civil law *cessio bonorum*, (*h*) the statutes of bankruptcy take from him all his property, give it to those who will act as trustees for all his creditors, and require that it should be divided in exact proportions to their several debts among all.

The early bankrupt laws of England proceeded upon an assumption, which they maintain to this day; it is, that bankruptcy is a crime, and that he who is guilty of it may properly be proceeded against as a criminal. (*i*) This arose, in part, from the fact that the earliest bankrupt laws were aimed against foreign merchants, who, after entering into mercantile obligations, too often, in the words of Coke, "suddenly escaped out of the realm," to the detriment of their creditors. (*j*) And in part from a similar fact, that after these laws were made to operate in relation to all merchants, subjects or aliens, they were still, as for some purposes they now are, confined to traders. And it was thought to be a grievous wrong, working extensive mischief, when a trader, who, from the nature of his business, generally owes many persons, should deprive them all of what was due to them, and perhaps needed by them to discharge their own obligations.

(*h*) The principle of *cessio bonorum* was introduced by the Christian emperors; and by it, if a debtor ceded and yielded up all his fortune to his creditors, he was secured from imprisonment for his debts. "*Omni quoque corporari cruciatu sernoto.*" Code, 7, 71.

(*i*) That such was the assumption on which the early laws of bankruptcy were based, is apparent from the language of 34 & 35 Hen. VIII., c. 4, — the earliest law on this subject relating to Englishmen. This law described bankrupts as "persons craftily obtaining into their hands great substance of other men's goods, who suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience." And while the strict line of distinction was maintained between bankrupt and insolvent laws, it might well be said, that the foundation of bankruptcy was criminality, and that of insolvency, misfortune. But when, as generally at the present day, the terms bankrupt and insolvent are used interchangeably, it would be perhaps too much to say, that the accident of a statute being called one or the other, would determine, in any degree, the question, whether crime or misfortune should be the basis of a proceeding under it.

(*j*) The most important of the early statutes against strangers, was that against the Lombards, which is nowhere to be found at this day, but was passed in the reign of Edward III., and is quoted by Lord *Coke* in 4 Inst. 277. It was enacted, that if any merchant of the company acknowledge himself bound in that manner, that then the company shall answer the debt; so that another merchant which is not of the company shall not be thereby grieved nor impeached.

The statutes of insolvency originally differed importantly from those of bankruptcy. They began much later than the bankrupt laws; and they have been amended and varied from time to time; and in this way two systems, one of bankruptcy law, and the other of insolvency law, grew up together; not only differing from each other, but, to a certain extent, complementary to each other. But in recent times they approach so near together that the distinction between them is much less positive and exact than it once was. (*k*) The insolvency law operates upon all debtors indiscriminately; but upon none, *in invitum*. That is, while the bankrupt law was confined to traders, but permitted a creditor to force any trader, who did not pay his debt to him, into bankruptcy, the insolvency law only permitted any and every debtor, without reference to his occupation, to divide all his effects ratably among all his creditors, without disturbance from either of them. And then the bankrupt law, perhaps, because it began with seizing and sequestrating the effects of the debtor as if he were fraudulent, in the end discharged all his mercantile debts, if all his effects were honestly given up, and no indication of fraud appeared anywhere. On

(*k*) Spence's Equitable Jurisdiction of the Court of Chancery, 198, and following pages. Also a learned article in the London Law Magazine, vol. i. N. S. 87, wherein the policy of the insolvent and bankrupt systems is set forth, and the English statutes on these subjects examined. See 2 Kent, 394 and note; Blanchard *v.* Russell, 13 Mass. 1; Ogden *v.* Saunders, 12 Wheat. 213. In the case of Sturges *v.* Crowninshield, 4 Wheat. 19, the distinction between bankrupt and insolvent laws was discussed, with reference to the clause of the Constitution of the United States, conferring on Congress the power to pass uniform laws on the subject of bankruptcy. *Marshall*, C. J., delivering the opinion in that case said: "The subject is divisible in its nature into bankrupt and insolvent laws, though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one and not to the other class of laws. But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act, and therefore unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of the imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity. . . . . This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations that are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law." The distinction between bankruptcy and insolvency will be found often alluded to in the cases cited *infra*. See especially, the learned opinion of *Bronson*, J., in Sackett *v.* Andros, 5 Hill, 327; *Livingston*, J., in Adams *v.* Storey, 1 Paine, C. C. 79.

the other hand, the insolvency law, which attacked no one, but invited all, discharged no debt, but protected the honest insolvent from further legal process against his person; subjecting, however, his subsequently acquired property to a liability for the debts contracted before insolvency. These differences, probably at least (for it may not be quite certain), constituted the original distinction between bankruptcy and insolvency. In the course of this chapter we use the words indifferently, as if they were synonymous, unless we indicate expressly, or by the context, that we speak of either specifically. As we have said, they have certainly come much nearer together, and they perfectly agree in their general purpose. This purpose divides itself into two parts, — the first, to secure to the creditors of a party failing a ratable distribution of all his property; the second, to secure to the honest debtor, after his property is thus applied, immunity, in a greater or less degree, from further molestation. (*l*)

SECTION II.

THE HISTORY OF AMERICAN BANKRUPT LAW.

The British colonies in this country did not adopt as part of their common law the English laws of bankruptcy and insolvency, but in many instances passed insolvent laws of their own. When they became independent, and the present Constitution of the United States was formed, the framers of it had the sagacity to perceive that a power to make a general bankrupt law, however seldom it might need to be exercised, must always exist in the general government of a commercial State; and this Constitution provides that "Congress shall have power . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States." (*m*) As this does not expressly and precisely declare that Congress may "pass a bankrupt

(*l*) See the remarks of Mr. Justice *Blackstone* on the purpose and policy of these laws. 2 Bl. Com. 473.

(*m*) Article 1, Section 8.

law," it was open to question, or at least to argument, whether Congress could make such a national law, or could only "establish" uniformity among the bankrupt laws of the several States. But this question is now settled. It is, indeed, generally admitted, that the almost contemporary construction of it should have sufficed to prevent the question. For on the 4th of April, 1800, the first bankrupt law was framed by Congress. It was limited to five years, and thence to the end of the next session of Congress. But it was repealed Dec. 19, 1803. (*n*)

If this early repeal indicated the unpopularity of such a law, that was further proved by the fact that no serious effort was made by petition to Congress to renew it, or provide a national bankrupt law, until 1840. (*o*) This measure was then pressed with much urgency, but very earnestly opposed; and it was defeated for that session. In the next, however, the effort was renewed, and was successful; a bankrupt law was enacted on the 19th of August, 1841.

The opposition was grounded in part upon the constitutional objection, that the power given to Congress was only incident to the power to regulate commerce, and that "bankruptcy," in the constitution, must be held to bear its limited and technical sense, as determined by English law. (*p*) A stronger objection

(*n*) The act of 1800, with the decisions upon it, will be found in the second volume of United States Statutes at Large, page 19, and the repealing act in the same volume, page 248. In this repealing act it was provided, that the repeal "shall in nowise affect the execution of any commission of bankruptcy which may have been issued prior to the passing of this act, but every such commission may and shall be proceeded on and fully executed, as though this act had not been passed."

(*o*) In 1829, twelve years before the passage of the last national bankrupt law, a powerful article appeared in the American Jurist, from the pen of Hon. S. E. Sewall, of Massachusetts. It strongly sets forth the condition of the country, under the contradictory opinions regarding, and conflicting adjudications upon, the State insolvent laws; calls for the enactment of a national law which shall establish uniformity on the subject, and combats the objections to such an enactment. 1 Am. Jur. 35.

(*p*) 2 Kent, 480 (8th ed.). The note to this page presents the legislative history of this law in a manner which supersedes the necessity of examination here. Chancellor *Kent* is of opinion, that the provision in the bankrupt act which rendered it a general insolvent act (that which provided for voluntary bankruptcy), was the one most exclusively in operation, and gave occasion to serious doubts whether it was within the true construction and purview of the constitution; and that it was that branch of the statute that brought the system — in his opinion, justly — into general discredit and condemnation, and led to the repeal of the law. Notwithstanding the doubts of which the learned Chancellor speaks, it seems to have been settled, so far as State courts could do it, that the provision for *voluntary* bankrupts was equally constitutional with the rest of the law, and that it applied to all debts, except those specified as beyond its application, contracted before or after its passage. Kunzler *v.* Kohaus, 5 Hill, 317;

was the waste and expense of all proceedings in bankruptcy The evidence of this is strong, and has grown in strength from the first operation of the statutes, and has called forth, not only an unqualified admission of the fact, but the regret and severe reprehension of the best judges. (*q*) But by far the greatest

Sackett *v.* Andross, id. 327. These cases are of great interest, as presenting very fully the argument on one side, and the other, on the right of Congress to pass a law for the benefit of *voluntary* debtors, which should apply to debts contracted before the act. In the first case, *Cowen*, J. delivered the opinion of the majority of the court, vindicating the constitutionality of the law in both these respects. From that opinion *Bronson*, J. dissented, and in the second case above cited, set forth his views with his customary earnestness and ability, in an opinion of nearly fifty pages. His conclusion is, that the voluntary branch of the bankrupt law was unconstitutional, for the following reasons: 1. It is not confined to traders, but extends to all classes of debtors. 2. It places the whole power in the hands of the debtor, without giving any means of coercion to the creditor. 3. It discharges the debt without the consent of the creditor in any form, and so violates the obligation of the contract. 4. If it retroacts, so as to discharge debts contracted before its passage, then it not only violates contracts, but it goes entirely beyond the scope of the bankrupt power. It is not a *law*, but a sentence or judgment against creditors, and Congress has no judicial power over the subject. A similar view was adopted by Judge *Wells*, of the U. S. District Court of Missouri, in the case of Edward Klein. The opinion will be found in 2 N. Y. Leg. Obs. 184; but on appeal, his decision was reversed by *Catron*, J., of the U. S. Supreme Court, sitting in the Circuit Court. He held that the law of 1841 was constitutional. In the matter of Edward Klein, 1 How. 277, in note to Nelson *v.* Carland. The law was pronounced constitutional also, in Thompson *v.* Alger, 12 Met. 428; State Bank *v.* Wilborn, 1 Eng. 35; Loud *v.* Pierce, 25 Me. 233; Morse *v.* Hovey, 1 Barb. Ch. 404; Lalor *v.* Wattles, 3 Gilman, 225; Dresser *v.* Brooks, 3 Barb. 429. And a suit which had been commenced before the law of insolvency went into operation, was wholly abrogated by the law if the creditor proved his debt; and in case of the failure of the debtor to obtain a discharge, it was necessary that the action should be recommenced *ab initio.* Haxtun *v.* Corse, 2 Barb. Ch. 506.

(*q*) Lord *Eldon* "took the first occasion of expressing strong indignation at the frauds committed under cover of the bankrupt laws, and his determination to repress such practices. Upon this subject his lordship observed, with warmth, that the abuse of the bankrupt law is a disgrace to the country, and it would be better at once to repeal all the statutes, than to suffer them to be applied to such purposes. There is no mercy to the estate. Nothing is less thought of than the object of the commission. As they are frequently conducted in the country, they are little more than stock in trade for the commissioners, the assignees, and the solicitor. Instead of solicitors attending to their duty, as ministers of the court, for they are so, commissions of bankruptcy are treated as matters of traffic, A taking out the commission, B and C to be his commissioners. They are considered as stock in trade, and calculations are made how many commissioners can be brought into the partnership. Unless the court holds a strong hand over bankruptcy, particularly as administered in this country, it is itself accessory to as great a nuisance as any known in the land, and known to pass under the forms of its law. . . . . His lordship added, that he was determined to make the officers of this court responsible to the justice of the country for their dealings in this court; and declared, with reference to the practice of lending a name to a person forbid by the court to take out a petition, that he would not hesitate to strike a solicitor off the roll who dare to lend his name to a person under such an interdict, and for that reason alone; but he would go further, and whenever a case of this nature should be brought forward, would direct the Attorney-General to prosecute for a conspiracy; for no worse conspiracy can be than that, the object of which is to make what the legislature intended as a lenient process against the bankrupt, a mode of defrauding the creditors and the

objection, and one that will always be likely to make a national bankrupt law unpopular, and will perhaps prevent its occurring again for a long time to come, is the universal belief, grounded upon all experience, that a bankrupt law is a mere sponge to wipe off indebtedness.

In the law of 1841, there was an endeavor to avoid a part of these objections, by uniting, in certain respects, the insolvency system with the bankrupt system. Two classes of debtors were provided for; or rather the statute, in the first place, permitted all debtors to become bankrupt, excepting only public defaulters, or those who had become debtors in some fiduciary capacity. (*r*) There was then a provision intended to be nearly equivalent to the English limitation to traders. Debtors who belonged to this latter class might be made bankrupts by compulsory process, while all others had the right to make themselves bankrupt, but could not be made so by others. In this respect the first provision is that of the insolvency system; and the second, that of the bankruptcy system. But then the statute gives to all bankrupts under this law, whether voluntary or involuntary, whether traders or otherwise, a discharge from their indebtedness. It offered in fact to every debtor a discharge of his debts.

The condition of the country at that time demanded precisely this relief. The community was burdened with an immense amount of indebtedness, which embarrassed the debtors, and prevented their engaging in any business that might give them subsistence and promote the prosperity of the country, and at the same time it gave to creditors only hopeless and valueless claims. The act afforded, in point of fact, the very relief it was intended to give; and when this good work was accomplished, the general objections to a bankruptcy law reappeared in full force, and on the 3d of March, 1843, the statute was repealed. But within this brief period, of little more than a year and a half, an immense multitude of persons availed themselves of the opportunity to discharge their debts by bankruptcy.

bankrupt" 6 Ves. 1. It might admit of reasonable doubt, whether the practice in this country, under the national law of 1841, would not, in some localities, have justified, to some extent, the language of Lord *Eldon*.

(*r*) As to who may be made bankrupts, or may become bankrupts of their own motion, see *infra*, Section 5.

Since then we have had, and have now, insolvent laws of one kind or another in almost all the States. These differ in their provisions very much; and, although it would be impossible to point out with any distinctness all these differences in a single chapter, we shall have occasion to notice some among them.

The most difficult question to which they have given rise is, as to the operation of a State insolvent law upon creditors who live in another State. The first objection was to the constitutionality of any State insolvent law, because it necessarily "impaired the obligation of the contract" of the debtor. But this was disposed of mainly by the help of a distinction between the *remedy* and the *right;* holding the first to be within State power, but the latter not. (*s*) This distinction was adopted by Chief Justice Marshall, from the argument of counsel, and sustained by him with great ingenuity and force. It certainly is very nice, and, when critically examined, becomes almost evanescent. But it is now very generally admitted, perhaps on the ground that its want of exact logical reason is compensated by the absolute necessity that this clause in the constitution should be thus qualified. But after this objection was disposed of, another arose, which is the most difficult question the State insolvent laws have ever caused. It is, as to the effect which such a law has upon creditors residing in another State. Considering the constant and very extensive commer-

(*s*) This distinction was made by Mr. *Hunter*, in his argument for the defendant, in Sturges *v.* Crowninshield, 4 Wheat. 122: "The obligation of a contract, and a remedy for its performance, are different things." *Marshall*, C. J., delivering the opinion of the court in that case, said: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. . . . Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there can be little doubt of its unconstitutionality. So with respect to the laws against usury." Le Roy *v.* Crowninshield, 2 Mason, 151.

cial intercourse between the different States of this Union, it is not surprising that this question recurs very frequently; but it is very much to be regretted that judicial opinions concerning it are so diverse and wholly irreconcilable, that it is impossible to say with certainty what the law is in relation to this subject. The distinction between remedy and right has been so applied as to hold as of the remedy only, — priority of or security to any particular creditor, imprisonment, statutes of limitation and usury, laws concerning processes in State courts, exemption of particular kinds of property, or of persons engaged in particular duties, or privileges attached to any office or territory. (*t*) Thus far, there is nothing to permit a State to

(*t*) Priority of payment of a particular creditor is matter relating to the remedy. Harrison *v.* Sterry, 5 Cranch, 289-298. *Marshall*, C. J.: "But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause." Imprisonment, — *Marshall*, C. J., in Sturges *v.* Crowninshield, above cited; Beers *v.* Haughton, 9 Pet. 329; Pugh *v.* Bussel, 2 Blackf. 394. See *Washington*, J., in Camfranque *v.* Burnell, 1 Wash. C. C. 340. Statutes of limitation and usury, — Sturges *v.* Crowninshield, 4 Wheat. 206; Le Roy *v.* Crowninshield, 2 Mason, 151, wherein *Story*, J., states and defines the limits of the doctrine; Decouche *v.* Savetier, 3 Johns. Ch. 190. *Kent*, Ch.: "The plea of the statute of limitations does not touch the merits of the action. It merely bars the remedy in the particular domestic forum, and does not conclude the plaintiff in his own or any other foreign country." Processes in State courts, — United States *v.* Robeson, 9 Pet. 319; Bank of United States *v.* Halstead, 10 Wheat. 51. Exemption of particular persons or property, — Morris *v.* Eves, 11 Mart. (La.), 730; Mather *v.* Bush, 16 Johns. 233, page 244, note (*b*). Privilege attached merely to person or territory, — Hinkley *v.* Morean, 3 Mason, 88. *Story*, J.: "The present suit is to be decided by the law of *Massachusetts;* and a discharge of the person of the debtor in another State [Maryland in the case before him], which leaves the contract in full force, has no effect to discharge the person here. No court gives effect to the local laws of another country or State in respect to the forms or force of process." In Melan *v.* Fitz James, 1 B. & P. 138, a different doctrine was laid down by the majority of the court, contrary to the opinion of Mr. Justice *Heath.* In Imlay *v.* Ellefsen, 2 East, 454, Lord *Ellenborough* expressed his unwillingness to accede to the doctrine of Melan *v.* Fitz James. The general doctrine of Hinkley *v.* Morean is recognized in Fenwick *v.* Sears, 1 Cranch, 259; Dixon *v.* Ramsay, 3 id. 319; Pearsall *v.* Dwight, 2 Mass. 84; 3 Burge on Col. & For. Law, 1046; Story on Conflict of Laws, § 339; Atwater *v.* Townsend, 4 Conn. 47; and see Smith *v.* Healy, id. 49; Smith *v.* Spinolla, 2 Johns. 198; White *v.* Canfield, 7 Johns. 117; Titus *v.* Hobart, 5 Mason, 378; Nash *v.* Tupper, 1 Caines, 402; Lodge *v.* Phelps, 2 Caines' Cas. in Error, 321; Green *v.* Sarmiento, 3 Wash. C. C. 17; Golden *v.* Prince, id. 314. The distinction in cases of this class is well laid down by *Parris*, J., in Judd *v.* Porter, 7 Greenl. 337: "This distinction is to be found in all the cases, that when the contract is discharged, either by a certificate of bankruptcy or otherwise, the body of the debtor is not thereafter liable to arrest in any jurisdiction for debts existing at the time of the bankruptcy; for, the contract being at an end, there remains nothing upon which the remedial laws of any government can operate. But when the body only of the debtor is discharged, leaving the contract unimpaired, the discharge is effectual only to the extent of the jurisdiction under which it was granted, and *extra territorium* has no efficacy." In addition to authority

release a debtor from the liability of his subsequently acquired property for his debt. And formerly, a great majority of the insolvent laws of the States, conformed to the insolvency system of England, so far as to create, or rather leave, this liability. But it was afterwards held by the Supreme Court of the United States, that an insolvent law which took away this liability, still affected only the remedy. (*u*) Hence the clause of

cited above, see the numerous cases cited by Professor *Greenleaf*, in the argument in Judd *v.* Porter. A different view was adopted in Millar *v.* Hall, 1 Dall. 229. The court say, that the defendant was compelled by law to transfer all his property for the benefit of his creditors. "Having done this we must presume that he has fairly done it, and therefore to permit the taking his person here, would be to attempt to compel him to perform an impossibility, that is, to pay a debt after he has been deprived of every means of payment, an attempt which would at least amount to perpetual imprisonment, unless the benevolence of his friends should interfere to discharge the plaintiff's account." Smith *v.* Brown, 3 Binn. 201; Hilliard *v.* Greenleaf, 5 id. 336, n.; Boggs *v.* Teackle, id. 332.

(*u*) It was at one time supposed that this question was passed upon by the Supreme Court in M'Millan *v.* M'Neill, 4 Wheat. 209. That such was not the case, see the remarks of Mr. Justice *Washington*, 12 Wheat. 254. The point decided in that case was, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract. The case of Ogden *v.* Saunders, 12 Wheat. 213, is the leading case on this topic. It was a case, as stated by Mr. Justice *Washington*, delivering his opinion, "of a debt contracted in the State of New York, by a citizen of that State, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that State, in force at the time when the debt was contracted." The action was brought by a citizen of New Orleans, in the United States District Court. The question, therefore, was directly upon the constitutionality of this bankrupt law, discharging, as it did, not only the person of the debtor, but his subsequently acquired effects, from liability to attachment and levy. And this question of constitutionality was twofold. 1. As affecting the rights of citizens of the same State. 2. As affecting the rights of citizens of different States. *Washington*, J., delivering his opinion, drew a distinction between impairing the contract and impairing the *obligation* of the contract. What is the obligation? *Marshall*, C. J., in 4 Wheat. 197, says, it is "The law which binds the parties to perform their agreement." What is the law referred to? Not the moral law, not exclusively the universal law of civilized nations (p. 258). It is the municipal law of the State (p. 259) which is a part of the contract, and goes with it wherever the parties are to be found. If it forms part of the contract, it is a solecism to say that it impairs the obligation (p. 260). This law no more impairs the obligation of contracts than an agreement, by the terms and at the time of contracting, that in case of the debtor's insolvency and surrender of all his property for the benefit of his creditors, he should be discharged from his contract. Nor can it be objected, that if this be so, a repeal of the law in execution, where the contract was formed, could violate the contract. The repeal would only affect subsequent contracts. This may be illustrated by statutes of usury, construction, fraud, and limitation. In all these the distinction between retrospective and prospective operation is to be observed. Especially an argument might be drawn from the case of limitations. The collocation of the clauses of this constitution, relating to this subject, formed the basis of an argument. The conclusion reached by Mr. Justice *Washington*, was, that a discharge under these circumstances was a valid bar; the question of the effect between citizens of different States not having yet been argued to at the bar. Mr. Justice *Johnson*, in this case, after vindicating the doctrine of Sturges *v.* Crowninshield, examines the ethical force of the terms "obligation of contracts," and reaches a conclusion which

the constitution, prohibiting the impairing of the obligation of contracts, may be said to permit any insolvent law which does not expressly discharge the debt itself. And as those of the State laws which discharge the debt, as that of Massachusetts, for example, are made to apply only to debts founded on contracts entered into after the passing of the act, and as the law existing when and where a contract is made, forms a part of it, and consequently enters into all contracts made subsequently to the law, it may now be said that a State law, whatever be its

he admits goes further than the doctrine of Sturges *v.* Crowninshield, that a law discharging the future effects of the debtor is valid, even as to contracts made prior to the passage of the law, and *multo fortiori*, subsequent ones. He repudiates the doctrine that the remedy is ingrafted into the law, but maintains, that inasmuch as a knowledge of the laws is imputed to every one who enters into contracts, no one can complain of surprise or want of public faith, in the application of those laws. The right to pass laws of limitation cannot be maintained, if that to pass bankrupt laws of this character is denied. The right to pass such laws has been asserted by every civilized nation (p. 287). Not a sufficient objection to say, that if the obligation of contracts has relation to all the laws which give or modify the remedy, the obligation is ambulatory and uncertain. (p. 288). Nor can a right in the States to pass tender laws be derived from that to pass bankrupt laws, for the former are expressly forbidden. It is urged that this is an arbitrary act, and future acquisitions might be made liable. But in answer, why may it not be urged, that the community has a right to set bounds to the will of contracting parties, for the public good, in this as in many other instances (p. 289)? *Thompson* and *Trimble*, JJ., concurred with the above-named judges. From this opinion *Story* and *Duvall*, JJ., together with the Chief Justice, dissented, and these were the grounds of their decision, as gathered from the opinion of *Marshall*, C. J.: 1. That the words of the clause of the constitution under consideration, taken in their natural and obvious sense, admit of a prospective as well as a retrospective operation. 2. That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement unless it have the full force of law. 3. That contracts derive their obligations from the act of the parties, not from the grant of government; and that the right of government to regulate the manner, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability after they have been formed. 4. That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties. So that the first branch of the question of constitutionality was answered in the affirmative. The second branch of the question having been argued, *Washington*, *Thompson*, and *Trimble*, JJ., were of opinion that the same reasons which governed them at the first hearing, applied in this aspect of the question. *Johnson*, J., who had agreed with them in the view then adopted, was of opinion, that although, "as between citizens of the same State, a discharge of a bankrupt by the laws of that State, is valid as it affects posterior contracts," yet, "that as against creditors, citizens of other States, it is invalid as to all contracts." The other three judges concurred in the opinion. Boyle *v.* Zacharie, 6 Pet. 348. So the second branch of the question was answered in the negative. Blanchard *v.* Russell, 13 Mass. 1; Mather *v.* Bush, 16 Johns. 233; Hicks *v.* Hotchkiss, 7 Johns. Ch. 299; Crittenden *v.* Jones, 5 Hall's L. J. 520; Townsend *v.* Townsend, Niles' Reg. 15th Sept. 1821; Shaw *v.* Robbins, 12 Wheat. 369, note (*a*); Mason *v.* Haile, 12 Wheat. 370, *Washington*, J., dissenting.

name, which is in fact a bankrupt law in all respects, may be constitutional.

In the next place, the municipal law of any State is a part of every contract made in that State, *and* to be performed therein. If the contract is made elsewhere, but to be performed in that State, we have seen, in our chapter on the law of place, that the contract has a kind of twofold law of place. In general, it is said that the place of a contract is that where it is to be performed, because it may be presumed that the parties proposed to be governed by those laws in the performance of the contract. (*v*) Each State has, then, by the present weight of authority, the right to determine *for its own citizens*, and its own courts, what it will, in respect to a contract which is *either* made within its sovereignty, *or* to be performed there. Thus, for instance, the insolvent law of Massachusetts "absolutely and wholly discharges the debtor from all debts, ... founded upon any contract made by him within the Commonwealth, *or* to be performed within the same." (*w*)

(*v*) See *supra*, the chapter on the Law of Place, Vol. II. pp. 582 and 583.

(*w*) That a State insolvent law may provide constitutionally for the discharge of all contracts made *within the State between its own citizens*, is a proposition which may now be considered as established. Ogden *v.* Saunders, 12 Wheat. 213, 368, 369; Walsh *v.* Farrand, 13 Mass. 19; Brigham *v.* Henderson, 1 Cush. 430; Converse *v.* Bradley, id. 434, in the note; Babcock *v.* Weston, 1 Gallis. 168; Baker *v.* Wheaton, 5 Mass. 509; Smith *v.* Smith, 2 Johns. 241; Smith *v.* Parsons, 1 Ohio, 107. So those persons who assent to the operation of such laws, by participating in proceedings had under them, are bound by such operation. Clay *v.* Smith, 3 Pet. 411. In Farmers & Mechanics Bank *v.* Smith, 6 Wheat. 131, a discharge under a Pennsylvania bankrupt act was held not to affect a contract between citizens of that State made previous to the passage of the law. But the proposition that a State insolvent law may operate a discharge of a debt contracted by one of its own citizens with the citizens of another State, when the contract is on its face to be performed within the State granting the discharge, is one which stands by no means without dispute at this day. We think, however, that the weight of authority sustains the proposition, though it cannot be denied that the decisions of courts of the highest character, and the dissent of at least one of the most learned judges in the country from the opinion of his associates, render the future preponderance of authority, to say the least, doubtful. In Blanchard *v.* Russell, 13 Mass. 1, the defendant, a merchant of New York, was indebted to the plaintiff on account stated for proceeds of goods consigned to him by plaintiff. Subsequently the defendant took advantage of an act for the benefit of insolvent debtors, etc., of the State of New York, and was discharged from all his debts. The plaintiff did not prove his claim, and had no knowledge of the proceedings save such as he might be charged with from the existence of the statute. The question was, whether, under these circumstances, the certificate of discharge was an effectual bar to the plaintiff's demand? *Parker*, C. J., said: "We think it may be assumed, as a rule affecting all personal contracts, that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country where they are made, if the contracting party is a subject of, or residen-

And further, as a correlative proposition, that no State can, by its municipal law, reach a contract which is not to be performed

in, that country where it is entered into, and no provision is introduced to refer it to the laws of any other country." It was held, that the certificate was a bar. The cases of Proctor *v.* Moore, 1 Mass. 199; Baker *v.* Wheaton, 5 id. 511; Watson *v.* Bourne, 10 id. 337, will be found in the opinion of *Parker*, C. J., not to be in conflict with Blanchard *v.* Russell on this point. In the following cases the court do not recognize the distinction as to place of performance of the contracts, but lay down the doctrine in general terms, that State insolvent laws can only operate upon those who are citizens of the State in which such law is enacted. But it is to be observed, that the circumstances of these cases were such as not to demand a recognition of such distinction. Ogden *v.* Saunders, 12 Wheat. 213; Shaw *v.* Robbins, id. 369, note; Boyle *v.* Zacharie, 6 Pet. 348, 635; Woodhull *v.* Wagner, 1 Baldw. 296; Frey *v.* Kirk, 4 Gill & J. 509; Springer *v.* Foster, 2 Story, 387. In the last case, *Story*, J., said: "The settled doctrine of the Supreme Court of the United States is, that no State insolvent laws can discharge the obligation of any contract made in the State, except such contract is made between citizens of that State." The cases of Braynard *v.* Marshall, 8 Pick. 196; Betts *v.* Bagley, 12 id. 572; Agnew *v.* Platt, 15 Pick. 417, go so far only as to hold, that a discharge in this State will not be an effectual bar to the claim of a creditor of another State, when the contract was not by its terms to be performed in this State. They do not decide the point, when there is such stipulation. The language of the judges in one of these cases, must be held to be uncalled for by the necessities of the case. See the strictures of *Story*, J., on the case of Braynard *v.* Marshall, in his Conflict of Laws. The point has never been directly decided in the Supreme Court of the United States. *Story*, J., in a case cited below. In Parkinson *v.* Scoville, 19 Wend. 150, the Supreme Court of New York decided the precise point, that an insolvent discharge (discharging the debtor from the payment of all his debts) is an absolute bar to a recovery upon a contract *made and to be executed* within the State, although the creditor be a non-resident, and neither united in the petition for a discharge, nor accepted a dividend, *Bronson*, J., delivering the opinion of the court. But in the later case of Donnelly *v.* Corbett, 3 Seld. 500, the New York Court of Appeals held, that where goods had been purchased of merchants in New York, by citizens of South Carolina, and a note was given, payable in the latter State, upon which a judgment was subsequently obtained in its courts, and the debtor imprisoned, his discharge from his imprisonment *and the debt* under an insolvent law of South Carolina, was invalid — four judges agreeing in this opinion, and two dissenting. In Poe *v.* Duck, 5 Md. 1, a contract had been made in Maryland between a citizen of that State and a citizen of another State (the creditor). There was an arguable question as to the place of performance of the contract. The creditor sued upon this contract in the court of Maryland after the discharge of the debtor by the bankrupt law of that State. The court below gave judgment for the plaintiff. In the Court of Appeals, the appellant's counsel contended, that the contract was made and to be performed in Maryland, and that being a Maryland contract, the discharge of the debtor under the law of that State, did not impair its obligation. It was urged on the other hand, that whether the contract was a domestic one or not, the discharge was inoperative as to citizens of other States. The court said: "We think that the judgment of the court below must be affirmed, *because the creditor is a citizen of another State*, and shall not express any opinion on the question, whether the contract is a Maryland one or not." Pugh *v.* Bussel, 2 Blackf. 394, and Potter *v.* Kerr, 1 Md. Ch. 275–281, adopt the same view. But in two recent cases, one relating to a discharge in a foreign country, and the other to a discharge in another State of the Union, the Supreme Court of Massachusetts have come to a different conclusion from that reached in the cases last cited above. In May *v.* Breed, 7 Cush. 15, which was assumpsit against defendants as acceptors of a bill of exchange, drawn by parties in Boston on defendants at Liverpool, and accepted by them payable at London, the defendants pleaded a certificate of discharge, under the English bankrupt law, obtained subsequent to the acceptance of this bill.

within its sovereignty, excepting so far as itself and its own courts are concerned. (*x*) From this it would seem to follow,

The plaintiffs did not prove their claim, nor had they received a dividend. The case was argued elaborately and learnedly at the bar, and *Shaw*, C. J., delivered the opinion, examining the authorities, and reaching the conclusion that a discharge under the English bankrupt law of a merchant residing in England, from a debt to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in this State, and that whether the creditor proved his debt under the English statute of bankruptcy would make no difference in the effect of the discharge. Scribner *v.* Fisher, 2 Gray, 43, was assumpsit on promissory notes payable to the plaintiffs, merchants of New York, by the defendant, a citizen of Lowell, in Massachusetts, payable at the Lowell Bank, in Lowell. The defendant pleaded in bar to the action his discharge in insolvency, under the Massachusetts statute, since the making of the notes. The plaintiffs had not proved nor offered to prove their claim. The court held, as a doctrine sanctioned by the spirit of the bankrupt laws, and nowhere contradicted by the decisions of the Supreme Court of the United States, that a certificate of discharge under the insolvent laws of this State, is a bar to an action on a contract, made by a citizen of this State with a citizen of another State, who does not prove his claim under those laws, if the contract, by its express terms, is to be performed in this State. From this opinion Mr. Justice *Metcalf* dissented, constrained by his view of the decisions of the Supreme Court of the United States, and the authority of *Johnson*, J., in 12 Wheat. 368, 369, Boyle *v.* Zacharie, 6 Pet. 348; *Marshall*, C. J., Woodhull *v.* Wagner, Baldw. 300; Springer *v.* Foster, 2 Story, 387; *Story*, J., in his Commentaries on the Constitution, Vol. 3, sections 1110, 1384; Braynard *v.* Marshall, 8 Pick. 196. From these cases he deduces the doctrine of the Supreme Court to be, "That a State insolvent law is unconstitutional when it affects the rights of citizens of other States, because a State has no authority by such a law to affect their rights." This opinion, it is proper to say, was rendered before the publication of the cases of Donnelly *v.* Corbett, and Poe *v.* Duck, above cited. But it has been affirmed by more recent decisions. Burrall *v.* Rice 5 Gray, 539; Capron *v.* Johnson, 1 id. note. In Felch *v.* Bugbee, 48 Me. 9, it was *held*, that a discharge of a debtor under the insolvent laws of Massachusetts, will not bar an action in the courts of Maine, instituted by a citizen of Maine against such debtor who resides in Massachusetts, although the contract was made, and, by its terms, is to be performed, in Massachusetts. In the case of Baldwin *v.* Bank of Newbury, decided by the Supreme Court of the U. S., in January T., 1864, confirming a decision of *Clifford*, J., the court unanimously decided against the ruling in the Supreme Court of Massachusetts, in Scribner *v.* Fisher, and in conformity with the dissenting opinion of *Metcalf*, J.

(*x*) In Bradford *v.* Farrand, 13 Mass. 18, a contract had been made in Massachusetts, with a citizen of that State, by a citizen of Pennsylvania, and no express provision was made that it should be performed in Pennsylvania; it was held, that the discharge of the debtor under the Pennsylvania statute of insolvency, was no bar to an action in Massachusetts upon this contract. The court said: "It has been settled in the case of Blanchard *v.* Russell, that a certificate of discharge under the insolvent law of another State is binding only upon contracts made within the State which enacts the law, or which by the terms of them are to be there performed. The debt in this case must be considered to have arisen within this State; the bargain from which it arose was made here, and it was not provided that it should be performed in Pennsylvania; although *the plaintiff might have applied there for his remedy, if he had seen fit.*" In Suydam *v.* Broadnax, 14 Pet. 67, a note had been made in New York, payable in New York, to citizens of New York, by citizens of Alabama. The plaintiffs sued in the Circuit Court of the United States, and it was held, that insolvency of the estate, judicially declared under the statute of Alabama, is not sufficient in law to abate a suit instituted in that court, by a citizen of another State, against the representatives of a citizen of Alabama. Boyle *v.* Zacharie, 6 Pet. 635; Cook *v.* Moffat, 5 How. 295; M'Millan *v.* M'Neill, 4 Wheat. 209. In Cook *v.* Moffat, Ogden *v.* Saunders having been cited on the argument, and the language of *Johnson*, J., adverted to, *Grier*, J., de-

that no contract made in one State and to be performed there, can be discharged, as to the persons of that State, by the law

livering the opinion of the court, said: "We do not deem it necessary, on the present occasion, either to vindicate the consistency of the propositions ruled in that case with the reasons on which it appears to have been founded, or to discuss anew the many vexed questions mooted therein, and on which the court were so much divided. It may be remarked, however, that the members of the court who were in a minority on the final decision of it, fully assented to the correctness of M'Millan v. M'Neill, which rules the present case." In Emory v. Grenough, 3 Dall. 369, the debt was contracted between citizens of Boston. Subsequently the defendant removed to Pennsylvania, and while a citizen there took advantage of the bankrupt law of that State. Subsequent to his discharge, he returned for a temporary purpose to Boston, and was arrested by the plaintiff, on an action brought by the Circuit Court. It was held, in that court, that the certificate was no bar. On a similar state of facts, a directly contrary opinion was adopted by the Circuit Court of Rhode Island, 3 Dall. 369. A writ of error on the Massachusetts case never reached a hearing. A valuable translation from 2 Hub. *De Conflictu Legum*, p. 538, is appended to the report of this case, 3 Dall. 370. The cases of Braynard v. Marshall, 8 Pick. 196; Agnew v. Platt, 15 id. 417; Betts v. Bagley, 12 id. 572; and Osborn v. Adams, 18 id. 245, in which this matter was discussed, were followed by the recent case of Savoye v. Marsh, 10 Met. 594. In this case the facts were, that the defendants made a note payable to their own order and indorsed it to the plaintiffs before maturity. The plaintiffs were inhabitants of New York, the defendants of Lowell, in the State of Massachusetts. The note was made in Boston. The defendants, after the making of the note, were discharged by the Massachusetts insolvent law. It was held, that this was not a bar to the action, notwithstanding the fact that the action was brought in the court of the same State which had granted the discharge; and *Dewey*, J., delivering the opinion of the court, laid down a doctrine which we cannot but regard as a wholesome one, as follows: "The distinction as to the forum where the party elects to institute his action, may be very material in regard to all that is mere remedy. The State courts may, in all actions instituted therein, give full force and effect to their own laws as to forms of proceeding, rights of attachment, holding to bail, imprisoning the body on execution, and the like; but a State insolvent law, operating upon the contract directly and discharging the party from all liability thereon, must, as to those to be affected by it, have the same operation in both tribunals. If it be a constitutional law, — if in its provisions it does not transcend the limits of State authority, — it must be valid in all tribunals, State or national. If otherwise, it must be held invalid and inoperative in all." A doctrine so reasonable as this, it may be expected, will eventually prevail. And see further, as cases presenting the most interesting discussion of this subject, Ogden v. Saunders, 12 Wheat. at the 272d page; Sturges v. Crowninshield, 4 id. 122; Clay v. Smith, 3 Pet. 411. *Parker*, C. J. in Braynard v. Marshall, 8 Pick. 194; Norton v. Cook, 9 Conn. 314; Woodhull v. Wagner, 1 Baldw. 296. And see the text-book authorities cited below; Fiske v. Foster, 10 Met. 597. The following authorities, in addition to those above, tend to show, that if the contract is made, or is to be performed abroad, such a discharge cannot be held a bar. Farmers and Mechanics Bank v. Smith, 6 Wheat. 131, 2 Kent, 293, note; Story on Bills, sect. 165; Story on Conflict of Laws, sect. 342; 3 Burge, Col. & For. L. 925; Lewis v. Owen, 4 B. & Ald. 654; Phillips v. Allan, 8 B. & C. 477; Smith v. Buchanan, 1 East, 6; Sherrill v. Hopkins, 1 Cowen, 103; Ory v. Winter, 16 Mart. (La.), 277; Watson v. Bourne, 10 Mass. 337; Baker v. Wheaton, 5 id. 509; Van Raugh v. Van Arsdaln, 3 Caines 154. See the foot-note to this case. Green v. Sarmiento, 3 Wash. C. C. 17. This case is an authority for the proposition, that such a discharge will not be considered a bar, if the contract has been sued and reduced to a judgment elsewhere. Nor if the contract was made before the passage of the insolvent act, and that undertakes to release the debt, and thus impair the obligation of contracts. Sturges v. Crowninshield, Farmers and Mechanics Bank v. Smith, cited *supra*. The following cases may here be

of another State in which the debtor resides. (*y*) Thus, a merchant living in Boston, makes in New York a note payable there, and then becomes insolvent in Massachusetts, and is discharged by the law of that State. If, now, the New York creditor comes to Massachusetts, and there sues the insolvent in the courts of Massachusetts, the discharge would be a bar to the suit. But he might proceed in New York, under the law of New York, against the person or property of the debtor if found there, and the discharge in Massachusetts would be no bar. If, however, the note was made in Boston, and made payable there, and the New York creditor sued it in New York, after a demand and refusal in Boston, the Massachusetts discharge would now be a bar. If the note were made not expressly payable in any place, and were made to a New York merchant, or becomes his property in good faith for value by indorsement or delivery before the discharge, is it now avail-

not inappropriately cited to the point that insolvent laws affect only the remedy, which have been cited *ante*, to other points. Suydam *v.* Broadnax, 14 Pet. 75; Watson *v.* Bourne, 10 Mass. 337; Beers *v.* Haughton, 9 Pet. 329. See also, Proctor *v.* Moore, 1 Mass. 199, and the cases cited in the preceding note. The doctrine is laid down in the following cases as applying only when the actions are brought on contracts made or to be performed elsewhere. Millar *v.* Hall, 1 Dall. 229; Emory *v.* Grenough, 3 id. 369. The courts of Pennsylvania, adopt the same rules of comity towards other nations which governs them in their dealings with Pennsylvania discharges. Van Raugh *v.* Van Arsdaln, 3 Caines, 154; Smith *v.* Smith, 2 Johns. 235; Hicks *v.* Brown, 12 id. 142; Blanchard *v.* Russell, 13 Mass. 1, cited supra; Baker *v.* Wheaton, 5 id. 509; Pitkin *v.* Thompson, 13 Pick. 64; Le Roy *v.* Crowninshield, 2 Mason, 151–175, together with Mr. Justice Story, in his Conflict of Laws, sections 281, 284, and Mr. *Burge*, in his Colonial and Foreign Law, vol. 3, 876–925, and 2 Kent, 390, set forth the doctrine that insolvent laws, relating in terms to the contract, are to be considered a part of the *lex loci contractus*, and govern wherever the creditor may live. A most valuable case relating to this whole subject, is Towne *v.* Smith, 1 Woodb. & M. 115, where the view of the text is confirmed by Mr. Justice *Woodbury*, in an elaborate and learned opinion. Woodbridge *v.* Allen, 12 Met. 570; Tebbetts *v.* Pickering, 5 Cush. 83; Clark *v.* Hatch, 7 Cush. 455; Palmer *v.* Goodwin, 32 Me. 535; Larrabee *v.* Talbot, 5 Gill, 426; Evans *v.* Spriggs, 2 Md. 457. See Perry Manuf. Co. *v.* Brown, 2 Woodb. & M. 440.

(*y*) The reason of this doctrine is well set forth by *Marshall*, C. J., in Sturges *v.* Crowninshield, above cited: "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected, are entitled to a hearing. Hence, any bankrupt or insolvent system professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another State be forced into the courts of a State for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of those rights, the constitution exempts from the jurisdiction of the State tribunals, without regard to the place where the contract may originate." To this point see Ogden *v.* Saunders, above cited; Dinsman *v.* Bradley, 5 Gray, 487; Houghton *v.* Maynard, id. 552. See also, on this question, Brown *v.* Collins, 41 N. H. 405, and Whitney *v.* Whiting, 35 N. H. 457.

able by the New York holder? We should say it was, so far as the courts of New York were concerned, because they would regard it as a debt payable in New York, and so perhaps it would be if the debt were originally payable in Massachusetts, and had been demanded there, and then sued in another State, and there reduced to a judgment; (z) but it could not be sued in the Massachusetts courts. It has been held, that a discharge under the insolvent laws of Massachusetts, is a bar to an action on a contract between two citizens of that State, though made and to be performed in another State. (*a*)

The difficulty attending these questions is far greater, when complicated with the fact that the courts of the United States exercise in each State a kind of *imperium in imperio*, so far as citizens of other States are concerned. If a New York merchant has a claim against a Boston merchant, which he might sue in New York, but cannot sue in the State courts of Massachusetts, and cannot, in fact, sue in New York, because he can neither make service on the person of the defendant there, nor on his property, if both person and property are in Massachusetts, he can, generally speaking, bring suit upon that claim in the Circuit Court of the United States sitting in Boston, and there make such service on the person, or such attachment of the property, as the laws of Massachusetts would permit a citizen of Massachusetts to make. If, therefore, the Boston creditors of the Boston insolvent, began by attachment, and this was dissolved by the debtor passing into insolvency, the New York creditor might bring his suit in the Circuit Court in Boston, and on that writ attach the property, and thus secure his own debt, and deprive the Boston creditors of all the assets to which they could look. This was manifestly unjust; and in 1848, a statute of the United States was passed, putting attachments in the courts of the United States on the same footing with those made on process issuing from the State courts. (*b*)

(z) Green *v.* Sarmiento, 3 Wash. C. C. 17, and other cases cited in the preceding notes.

(*a*) Marsh *v.* Putnam, 3 Gray, 551.

(*b*) By chapter 18, of the statutes of the 30th Congress, approved March 14, 1848, it is provided: "That whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached to satisfy such judgment as may be recovered by the plaintiff in such process, and any contingency occurs,

We cannot certainly know the whole effect of this statute, until that shall have been determined by sufficient adjudication. We see nothing in it, however, to prevent process by summons to the debtor, and a judgment to be obtained against him, and an execution to be satisfied on his property. We should say, however, that the execution could not reach his property, certainly if his property had in the mean time been distributed among his creditors, and probably not if it had passed into the hands of the assignees. And possibly the property would be protected, if the first step towards legal insolvency had been taken, by that principle of relation of which we shall have to say more presently.

Upon the whole, however, it may be regretted, it cannot be denied, that the law upon nearly all these questions is as yet somewhat uncertain. The cases are numerous and conflicting; and as we are not aware that they have been anywhere collected and arranged, we endeavor to do this in our notes. (*c*)

It is now settled that the United States and the several States have a concurrent power to enact a bankrupt law or an insolvent law. (*d*) But as the constitution gives to Congress the power to enact "uniform laws" on the subject of bankruptcies, it is a fair inference, that every national statute of bankruptcy is intended to execute this power and introduce a uniform system. (*e*)

by which according to the laws of a State such attachment would be dissolved upon like process pending in or returnable to the State courts, then such attachment or attachments, made upon process issuing from, or pending in, the courts of the United States within such States, shall be dissolved, the intent and the meaning of this act being to place such attachments in the courts of the States, and the United States, upon the same footing; *provided*, that nothing herein contained shall interfere with any existing or future law giving priority in payments of debts to the United States."

(*c*) See notes (*w*) and (*x*) *ante*, and the notes to the next section, on bankruptcy under foreign law.

(*d*) See the discussion of this subject in the cases cited in the previous notes, where the concurrent right is fully admitted, and *infra*.

(*e*) "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but the actual establishment, which is inconsistent with the partial acts of the States. It has been said that Congress has exercised this power, and by doing so has extinguished the power of the States, which cannot be revived by repealing the law of Congress. We do not think so. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer that

If, therefore, while such a law existed, a State statute should pass precisely the same, it would be useless; and if it differed at all from the national law, it would just so far defeat the purpose of that law, and the purpose of the constitution in permitting Congress to pass such a law. It follows, therefore, that the several States may pass laws on this subject, when there is no national law. But as soon as a national law is passed, it wholly supersedes and suspends every State law. (*f*) Such is the latest, and we think the best doctrine. But as it only supersedes and suspends, and does not repeal, we thence infer that the State laws, so suspended, would revive when the national law expired.

A somewhat analogous question arises in the several States, but is sometimes provided for by the statutes. It is, whether an insolvent act avoids voluntary assignments. We have already intimated, that the general purpose of an insolvent law being to produce an equal or ratable division of the effects of a debtor, it should do more than encourage this; it should pro-

power upon the States; but it removes a disability to its exercise which was created by the act of Congress." *Marshall*, C. J., in Sturges *v.* Crowninshield, 4 Wheat. 191.

(*f*) "So far as the State insolvent laws may prevent or even impede the operation of the bankrupt law, they must yield to it, in order that it may fully accomplish its object of establishing a uniform system of bankruptcy throughout the United States; but while the State laws thus yield, they are not entirely abrogated. They exist and operate with full vigor until the bankrupt law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the bankrupt law, by being declared a bankrupt by a decree of the court. Before that time, I think, upon a sound construction of the bankrupt act, it does not necessarily come in conflict with the insolvent laws of the States." *Battle*, J., delivering the opinion of the Supreme Court of North Carolina, in *Ex parte* Ziegenfuss, 2 Ired. 463. But this doctrine has not met with subsequent approval. In Judd *v.* Ives, 4 Met. 401, the court say: "We are of opinion that the act of Congress, to establish a uniform system of bankruptcy throughout the United States, does suspend the operation of the law of this Commonwealth, entitled 'An Act for the relief of insolvent debtors,' &c., as to all persons and cases that are within its provisions. . . . But we are nevertheless of opinion, that this consequence of the act is limited to cases instituted under the insolvent law subsequent to the period when the bankrupt law went into operation, and that it cannot supersede or suspend proceedings rightfully commenced under the insolvent act, prior to the time of its going into operation." *Ex parte* Eames, 2 Story, 322, 5 Law Reporter, 117. In the matter of Holmes, 5 Law Rep. 360, in the District Court of Maine. In Griswold *v.* Pratt, 9 Met. 16, the doctrine of Ziegenfuss's case was adverted to, and the court said: "This principle, though at first view it may seem plausible, cannot, we think, be sustained." Blanchard *v.* Russell, 13 Mass. 1, and the cases cited by *Parker*, C. J. And a debt contracted while the insolvent law was suspended by the national bankrupt law, may be discharged under the insolvent law, which revived when the bankrupt law was repealed Austin *v.* Caverley, 10 Met. 332.

hibit and prevent preferences, by something more effectual than merely withholding a discharge. In most of the States this is now done. But the practice does not always conform to the law. Thus, in Massachusetts, where a voluntary assignment is void, or would not protect the transfer of property against process under the insolvent law, it is not uncommon to make such assignments, the assignees being required to collect, dispose of, and distribute all the effects and property of the assignor, without preference, and in exact conformity with the provisions of the insolvent law. Where every thing is done under such an assignment in good faith, and no suspicion attaches, and the creditors come in, and the assignor is discharged under seal, the whole effect of the insolvent law is produced without the delay and cost of the legal processes. (*g*) Such an assignment is made legal in England by 12 & 13 Vict., if six-sevenths of the creditors approve it. (*h*)

(*g*) It may properly be observed, however, that there is always more or less of hazard attending such assignments, though they are frequently made. The assignment must be drawn in all its details with the greatest care, and slight errors are of fatal consequence. Moreover, there is not unfrequently difficulty in relation to the assent of creditors. If any of them choose, they may, unless there be some statute provision allowing such assignments, invalidate the whole proceedings. The practice may be indulged in so long as the proceeding is wholly *in pais*, but when the matter comes before the courts, they are bound by the statutes. Mann *v.* Huston, 1 Gray, 250. In Barton *v.* Tower, 5 Law Reporter, 214, an assignment of their property had been made by two partners, with a direction that it should be distributed among their creditors by the assignees, "in the same manner as if the same were in the hands of an assignee under the bankrupt act of the United States, by virtue of proceedings duly had in bankruptcy." This assignment was held an act of bankruptcy and void. And *Conckling*, J., delivering the opinion of the court, said: "There are three descriptions of fraudulent conveyances, assignments, &c., which bring a merchant, banker, factor, &c., within the operation of the first section of the bankrupt act. 1. Such as are fraudulent, or against the common law, or the provision of such English statutes as have been incorporated into the jurisprudence of this country; 2. (as I am now well satisfied, whatever doubts I may have originally entertained,) such as are voluntarily made, in contemplation of bankruptcy, and for the purpose of giving a preference to one or more of the creditors of the debtor over his other creditors. The making of a conveyance of this description has always been held to be an act of bankruptcy under the English bankrupt law, as being contrary to the policy of law, without any express words in the statute. But in our act they are expressly declared to be 'utterly void, and a fraud upon this act.' 3. Assignments of all the effects of the debtor, whether upon trust for the benefit of his creditors or not, on the ground, first, that the debtor necessarily deprives himself, by such an act, of the power of carrying on his trade, and secondly, that he endeavors to put his property under a course of application and distribution among his creditors, different from that which would take place under the bankrupt law. It is unnecessary to cite authorities to show, that such an assignment is an act of bankruptcy in England, because it has been a well-settled and familiar rule. It is a sound and useful rule; and there is nothing whatever in the language of our act which requires a different construction in this respect." *Ex parte* Breneman, Crabbe, 456.

(*h*) Section 224 of the above statute

Always and everywhere, an assignment for the benefit of creditors is void if it be fraudulent. But it seems to be conceded, that an assignment is not fraudulent in this sense, and to this effect, whenever the assignee *may*, under its provisions, commit a fraud, but only when those provisions, if carried out according to their fair and rational meaning, would, of themselves, work a fraud. (*i*) And the character of the assignment, in this particular, cannot be created, or even affected, by events subsequent to the assignment. (*j*)

As a voluntary assignment is a contract which needs the concurrence of both parties, — the debtor and his creditors, — their assent should be expressed; but, in general, it may be presumed if the assignment be beneficial, and so will the assent of the trustees to whom the assignment is made, if there be no circumstances to indicate that the assent was withheld. (*k*)

A voluntary assignment is avoided, generally, by a provision that but a certain number, or a certain proportion, of the assignee's debts should be paid and the balance returned to him, (*l*) unless it be made to the creditors themselves, when it is held as only an additional security to them. (*m*) So if it be made to prevent attachment, although the debtor intended to benefit his creditors. (*n*) And if it provides that no creditor shall take advantage of it who does not sign in, and thereby

provides, "That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by, or on behalf of, six-sevenths in number and value of those creditors whose debts amount to ten pounds and upwards, touching such trader's liabilities and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory, in all respects, upon all the creditors who shall not have signed such deed or memorandum or arrangement as if they had duly signed the same." Section 228 enacts, "That the creditors of such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed in like manner as in bankruptcy." On the construction of these clauses, see Tetley *v.* Taylor, 1 Ellis & B. 521, 8 Eng. L. & Eq. 370, s. c. on appeal in Exch. Chamber, 1 Ellis & B. 532, 12 Eng. L. & Eq. 469.

(*i*) Ward *v.* Tingley, 4 Sandf. Ch. 476; Webb *v.* Daggett 2 Barb. 9.

(*j*) Browning *v.* Hart, 6 Barb. 91; Averill *v.* Loucks, id. 470.

(*k*) Adams *v.* Blodgett, 2 Woodb. & M. 233.

(*l*) Goodrich *v.* Downs, 6 Hill, 438; Barney *v.* Griffin, 4 Sandf. Ch. 552, 2 Comst. 365; Leitch *v.* Hollister, 4 Comst. 211; Hooper *v.* Tuckerman, 3 Sandf. 311. But in some States, there must also be a release, to make the assignment void. Austin *v.* Johnson, 7 Humph. 191; Hindman *v.* Dill, 11 Ala. 689; Grimshaw *v.* Walker, 12 Ala. 101.

(*m*) See cases in last note.

(*n*) Kimball *v.* Thompson, 4 Cush. 441.

release the debtor before a certain day, it is void as to all who do not assent. (*o*) And it has been held, that an authority to the trustees to sell the property for credit, avoids the assignment; (*p*) but this is doubted. (*q*) And so it is whether a mere intent to delay creditors is necessarily fraudulent, or has the effect of avoiding the assignment, unless it be actually fraudulent. (*r*)

Perhaps property exempted from execution cannot be fraudulently conveyed, as against creditors. (*s*)

SECTION III.

OF INSOLVENCY OR BANKRUPTCY UNDER FOREIGN LAWS.

For many purposes our several States are foreign to each other, in reference to their respective insolvent laws; but the subject we would now consider, because that of the preceding section leads to it, is the effect of bankruptcies or insolvencies under the laws of foreign nations, as of France or England, for example; and the effect of bankruptcies or insolvencies under our own laws, upon the citizens or subjects of those foreign governments.

It may be said to be well established, and mainly on the principles and authorities already stated, that the discharge of a debt not made nor to be performed within the State where it is discharged, has no force elsewhere; and that the discharge of a debt in the State in which it was made and is to be performed,

(*o*) Stewart *v*. Spenser, 1 Curtis, 157; Ramsdell *v*. Sigerson, 2 Gilman, 78; Ingraham *v*. Grigg, 13 Smedes & M. 22; Conkling *v*. Carson, 11 Ill. 503; McCall *v*. Hinkley, 4 Gill, 128.

(*p*) Barney *v*. Griffin, 2 Comst. 365.

(*q*) Nicholson *v*. Leavitt, 4 Sandf. 252.

(*r*) See, for the affirmative case last cited, *contra*, Burdick *v*. Post, 12 Barb. 168; and see Kellogg *v*. Slawson, 15 Barb. 56.

(*s*) So held in Bond *v*. Seymour, 1 Chandler, 40. But a general assignment, containing a reservation of all property not subject to attachment, was held to be thereby avoided, in Sugg *v*. Tillman, 2 Swan, 208. As to what stipulations in an assignment avoid it as to creditors, see Bodley *v*. Goodrich, 7 How. 276; Hart *v*. Crane, 7 Paige, 37; Bryant *v*. Young, 21 Ala. 264; Woodburn *v*. Mosher, 9 Barb. 255; Rollins *v*. Mooers, 25 Me. 192; Webster *v*. Withey, 25 Me. 326; Montgomery *v*. Kirksey, 26 Ala. 172; Wiley *v*. Knight, 27 Ala. 336; Nesbitt *v*. Digby, 13 Ill. 387.

and of which both parties are citizens, is valid everywhere. But if made in one State, to be performed in another, the laws of the first State cannot operate against those of the second. So, if made between citizens of two States, the debtor may be discharged by the laws of his own State, and yet be amenable under the laws of the other. (*t*)

But insolvent and bankrupt laws also sequestrate the property of the insolvent at the commencement of proceedings. And it is an important question how far a foreign law can operate in this respect. Thus, an Englishman, or an American trader in England, is there a bankrupt, and his assignees become invested with all his rights of property, and take possession of his effects

(*t*) See the cases already cited in the notes of the last section. The doctrine of the text is well set forth by *Betts*, J., delivering the opinion of the court in the matter of Zarega, 4 Law Reporter, 480. "It appears that some of the creditors of the petitioner reside abroad, and the objection taken by the opposing counsel is, that the discharge of the bankrupt under the laws of this country, do not discharge him from his creditors residing abroad. The exception is taken under the idea that the debt was contracted in Germany, although I see no evidence before the court to that effect, or any thing to show but that the debt was contracted here in the ordinary course of business transactions, such as an order sent abroad for goods, or the like. It is not essential to ascertain the origin or location of the debt If, however, the debt was contracted in Germany, it might have an effect on the proceedings when the final steps are to be taken. The question here is, whether the discharge of a bankrupt under the law of this country, would operate as a bar to the demands of foreign creditors, it being asserted that the United States have no power to destroy contracts entered into without their jurisdiction, and the contract is to be left to the jurisdiction of that country wherein it originated. It is not important, in disposing of this question, to enter into a discussion of the essence of contracts or their obligations, nor to inquire into the effect of a discharge in this country, under the bankrupt law, if set up in a foreign country as a bar to the claims of creditors. In England, as well as in France and Holland, and perhaps throughout Europe generally, the discharge of a bankrupt, under the laws of either country, operates in all other places whatsoever. So a person having been decreed a bankrupt in France, may avail himself of the privileges it confers on him in any part of England, and plead it with the same effect as in his own country. So in England, where they set up that claim in behalf of their own bankrupts in foreign countries, they allow the same privileges to others. But in this country we do not recognize such a doctrine. A discharge as a bankrupt in a foreign country, is not deemed here a bar to any action that may be brought. The discharge is considered as local; and although an assignee of an individual, declared a bankrupt in a foreign country, would be allowed to sue as such assignee, yet our courts would not recognize the discharge as a bar to debts contracted in this country, or due to citizens of this country." The courts of Pennsylvania seem to have adopted, to a considerable extent, the principles of comity which have prevailed in the English courts, and hold, that the same effect shall be given to a discharge in insolvency in another State, which that State gives to discharges in the State of Pennsylvania. Smith *v.* Brown, 3 Binn. 201; Boggs *v.* Teackle, 5 id. 332; Walsh *v.* Nourse, id. 381. But if the debt is both contracted and to be discharged in the foreign State, a discharge there will bind the creditor, even if he be a resident of this country. The cases above cited, and especially *Shaw*, C. J., in May *v.* Breed, 7 Cush. 15; Sherrill *v.* Hopkins, 1 Cowen, 103; Very *v.* McHenry, 29 Me. 206.

as far as they can. But he has property in Boston, and a creditor there attaches that property before the assignees take possession; and the question comes up, whether this creditor or his assignees have the better right. In other words, can the Boston creditor receive his whole debt out of the property he has attached, or must that property pass into the general fund, and that creditor take only his dividend.

It is obvious that the system of bankrupt laws may be regarded in two ways. In one, it would be merely local and municipal. In the other, it would be in some sort a branch of the law of nations. Assuming that all civilized nations have now some kind of insolvent system, it may then be held, that all of these taken together, constitute the insolvent law of nations; and that each State will regard the peculiarities of its own law, but will respect, as far as possible, the law of other nations, and will regard the general principles in which all agree, as belonging to the system of law which is obligatory upon all; and among these general principles is that of a sequestration, for the general good of all the creditors, of all the property of the insolvent.

The courts of England, France, (*u*) and Holland, (*v*) certainly lean towards the latter view of this subject. There it seems to be established, that a transfer in bankruptcy operates in the same way as a sale or other voluntary assignment for value by the insolvent, and effectually conveys all his property, wherever

(*u*) See the Appendix to Cooke's Bankrupt Law, p. 27, *et seq.* where the case of Parish *v.* Sevon is reported, as having been decided in the French court, which accords precisely with the English doctrine on the subject, cited by Chancellor *Kent*, in Holmes *v.* Remsen, 4 Johns. Ch. 484.

(*v*) The grounds of the decisions of the courts of France and Holland, are thus summed up by *Story*, J., in his Conflict of Laws, § 417: — 1. That the law of the domicil may rightfully divest the debtor and the administrator of his property, and place it under the administration of assignees or syndics. 2. That laws, whose effects are to regulate the capacity and incapacity of persons, their personal actions and their movables, everywhere belong to the category of personal statutes. 3. That it is a matter of universal jurisprudence, and especially of that of France and the Netherlands, that the debts, actually considered, of an inhabitant against a foreigner, are deemed a part of his movable property, and have their locality in the place of domicil of the creditor. At the same time, it is admitted that a purchaser from the bankrupt, in a foreign country, of property there locally situate, would be entitled to hold it against the assignees, if, at the time, he had no knowledge of any bankruptcy, or of any intent to defraud creditors. And see Henry on Foreign Law, pp. 127, 135, 153, 160, 248 250; Merlin, Repertoire De Jur. *Fallite et Banqueroute.*

t may be, in the same manner and with the same consequences as if he had sold it. (*w*) There are obvious and powerful rea-

(*w*) A leading case in England upon his subject is that of Sill *v.* Worswick, 1 H. Bl. 665. The question considered by he court, without going into the details of he case, was simply whether an assignment in bankruptcy in England, carried with it money of the bankrupt in the sland of St. Christopher, where the laws of England have no binding force as against a creditor there, who had attached he property, after the act of bankruptcy, but before assignment. The authorities were examined at great length in the argument and by the judge who gave the opinion of the court. And Lord *Loughborough* said: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner, in any country, may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. . . . Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees. In the two cases of Solomons *v.* Ross, and Jollett *v.* Deponthieu, where the laws of Holland, having, in like manner as a commission of bankruptcy here, taken the administration of the property and vested it in persons who are called curators of desolate estates, the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor, seeking to attach those debts. In those cases the Court of Chancery felt very strongly the principle which I have stated, that it has had a very universal observance among all nations. The doctrine of the English cases seemed based on two leading principles. First, that the system of bankrupt law ought not to be considered local, but universal, and that the whole system of bankruptcy should be held to be part of the law of nations, and, as such, the acts of one nation thereunder should be equally respected in all. The other is, that the effect of the bankruptcy and assignment, is to sequestrate all the bankrupt's property at once, and to transfer all his interest to his assignees, as in the case of a voluntary transfer or grant; that is to say, they regard the act as his own, though done under compulsion of the law." The leading case also, of Royal Bank of Scotland, &c. *v.* Cuthbert (Stein's case), 1 Rose's Cases, 462; Selkrig *v.* Davies, 2 Rose, 291; Quelin *v.* Moisson, 1 Knapp, 265; Selkrig *v.* Davies, again reported, 2 Dow, 230; *Ex parte* D'Obree, 8 Ves. 82; Pipon *v.* Pipon, Ambler, 25; *In re* Wilson, 1 H. Bl. 691; Solomons *v.* Ross, id. 131, note; Jollett *v.* Deponthieu, id. 132, note; Neil *v.* Cottingham, id.; Hunter *v.* Potts, 4 T. R. 182; *Ex parte* Blakes, 1 Cox, 398; Smith *v.* Buchanan, 1 East, 6; Potter *v.* Brown, 5 id. 124–131; Wadham *v.* Marlowe, 1 H. Bl. 437–439, note, s. c. 8 East, 314–316, note (*a*); Philips *v.* Hunter, 2 H. Bl. 402. Before the time of the American Revolution, the English courts held a different doctrine, adopting the view which prevails at this day in the American courts. Cleve *v.* Mills, before Lord *Mansfield*, 1 Cooke, B. L. 303. In Chevalier *v.* Lynch, the same doctrine. A creditor of the bankrupt, in that case, against whom a commission had issued in England, attached a sum of money in the hands of a debtor of the bankrupt in St. Christopher, an island within the British dominions. The court held this attachment good. Lord *Mans-*

sons why this view should be adopted universally. The same reason for desiring to make uniform the laws of our several States respecting bankruptcy, would lead to the same wish in respect to the commercial nations of the world. That every nation has a perfect right to regulate this matter by its own laws, so far as it concerns its own courts and its own citizens, no one doubts. The only question is, whether that amity of nations which is grounded upon the highest expediency, and the real advantage of each one, would not lead to this result. In this country it has been held otherwise. And our courts regard the bankrupt laws of any State as of strictly municipal origin and application, and as wholly without force or influence abroad. (x) Hence it may be regarded as established here, by

field: "If a bankrupt has money due to him out of England, the assignment, under the bankrupt laws, so far vests the right to the money in the assignees that the debtor shall be answerable to them. But if, in the mean time, after the bankruptcy, and before payment to the assignees, money owing to the bankrupt out of England, is attached *bona fide*, by regular process, according to the law of the place, the assignees in such case cannot recover the debt." Doug. 170; Waring *v.* Knight, 1 Cooke's Bankrupt Law, 307; Story on Conflict of Laws, tit. Bankruptcy. See the English, Scotch, and Irish authorities collated and examined in 2 Bell, Com. 681. The remarks of *Story*, J., in his Conflict of Laws, on this subject, are of great value to the inquirer. The same view was recognized and adopted by the learned Chancellor *Kent*, in Holmes *v.* Remsen, 4 Johns. Ch. 460; so in Bird *v.* Pierpoint, 1 Johns. 118, the language of *Livingston*, J., tends to show that the court at that time entertained a similar view. Goodwin *v.* Jones, 3 Mass. 517, *Parsons*, C. J.; Bird *v.* Caritat, 2 Johns. 342. See a tendency to the same doctrine, but with limitation, in Ingraham *v.* Geyer, 13 Mass. 147. But these cases oppose the great weight of American authority. See *infra*.

(x) The two leading principles which govern the English courts in their administration of the law of bankruptcy in cases of foreign assignment, have been set forth and illustrated *ante*. The grounds on which the application of each of them in this country has been denied, may be shown from the language of two eminent judges. In Saunders *v.* Williams, 5 N. H. 215, Mr. Chief Justice *Richardson* said: "The rule, which must give effect here to a bankrupt law of a foreign country, is a mere rule of amity, and not of international law, and in the present circumstances of this country, it is thought that no rule of amity can require us to give effect to a foreign law of bankruptcy here, in such a manner as to deprive our own citizens of the remedy which our own laws give them against the property of their foreign debtors, which may be found in this country." And in Milne *v.* Moreton, 6 Binn. 369, Mr. Chief Justice *Tilghman* said: "It was remarked, during the argument, that no good reason can be assigned, why an assignment by the bankrupt himself should prevail, and not the present one, as made by the commissioners, which ought to be considered as equivalent thereto, and be deemed a *voluntary* conveyance made by the bankrupt himself, for a valuable consideration. The difference appears to me sufficiently obvious. Effect is given to the fair assignment of the bankrupt himself, because it is the spontaneous act of the party, having the full dominion over the property, transferring an equitable if not a legal title thereto, after which his interest therein necessarily ceases, and is no longer subject to an attachment. It is wholly superfluous to cite Justinian, lib. 2, tit. 1, § 40, to show that nothing is more conformable to natural equity, than to confirm the will of him who is desirous to transfer his property to another. But effect can-

the past adjudication on these cases, that any American creditor may, by process of law, retain any property of his debtor which he can get a legal hold upon, by transfer, attachment, or levy, against the claims of any foreign assignee in bankruptcy. (*y*)

not be given to the assignment by the commissioners unless we adopt the British statutes of bankruptcy, as laws binding on ourselves, although they were not considered to affect us, when we were the colonies of Great Britain; and this, too, when their operation would manifestly interfere with the interests of our own citizens." So in Holmes *v.* Remsen, 20 Johns. 229–265, in which case the decision of Chancellor *Kent*, above cited, was reversed, the judge delivering the opinion of the court, said: "It is an established and universal principle, that, independent of express municipal law, personal property of foreigners, dying testate or intestate, has locality. Administration must be granted and distribution made in the country where the property is found; and as to creditors, the *lex rei sitæ* prevails against the law of the domicil, in regard to the rule of preferences. In principle, I perceive no difference between that case and the present. Why should not a liberal comity, also, demand that the first grant of letters of administration should draw to it the distribution, among creditors, of the whole assets, wherever situated? The plausible reason for the distinction may be, that the interests of commerce require a discrimination in favor of the assignees of bankrupts. But in practice I believe it will be found that commerce is equally affected by the rule, in both cases, because the rule, in either case, can seldom be applied, except to merchants and traders. And whether administration be committed to the executors or administrators of a dead man, or to the assignees of a bankrupt, is not very material to the point before us. Anomalies are inconvenient in the law, and should not be allowed without strong reason."

(*y*) The case of Harrison *v.* Sterry, 5 Cranch, 289, was decided by *Marshall*, C. J., in 1809. It is there said: "The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States." In his opinion in Holmes *v.* Remsen, above cited, Chancellor *Kent* said, that the decree of the court in that case, and on this point wants explanation, "and we do not know the grounds of the decision. It is never, however, to be presumed, that any court intends either to establish or reject a litigated point of law, of great importance, merely by a dry decision, unaccompanied with argument or illustration." Yet of this case it may, with respect to so great a name as Chancellor *Kent*, be observed, that this opinion, although unaccompanied with argument or illustration, was essential to the decision of the case, and can by no means be regarded as an *obiter dictum*, and that every court must be presumed to intend to establish every point of law passed upon essential to the decision of the case. The doctrines of this case have been universally followed, so far as we know, in this country, with the limitation set forth in the following note. Blake *v.* Williams and Marshall, Trustee, 6 Pick. 286. In that case, the question was, whether Marshall, a debtor of Williams, should be held as his trustee, and to pay to the plaintiff the debt he acknowledged to be due to the principal defendant. The trustee's answer disclosed, that a commission of bankruptcy had issued against Williams in England, where he resided, and did business as a banker, on the 27th of October, 1825, in consequence of an act of bankruptcy previously committed by him; and in pursuance of the commission, the commissioners of bankruptcy proceeded to assign over to the assignees all the property of Williams, including the debts due him. It appeared further, that the trustee had received no formal notice of the assignment by the commissioners in England, at the time of his being summoned, on the 3d of December, 1825, but that such notice was subsequently given — and the assignees, by a person authorized by them for this purpose, had demanded of him that he should pay over to them the amount of the debt due from him to Williams. Upon these facts, the court said they saw no reason why the trustee should not be charged. *Parker*, C. J.: "Does, then, a commission of bankruptcy in England, and an assignment of the bankrupt's effects under it, so transfer a debt due to the bankrupt from a citizen of this State to the assignees, that another citizen who

We should limit this, however, to cases in which the assignee had not previously obtained possession. Our courts can hardly deny that the foreign assignee has acquired an inchoate title, and a right to perfect his title by possession as soon as he can. And if he thus perfects his title, having, to use the language of the civil law, not only the *jus ad rem*, but the *jus in re*, the property should be held to be his by legal title as complete and consummate as sale with delivery could give. (z)

is a creditor of the bankrupt, cannot seize it on a trustee process and secure it to himself? We think it very clear that this question has not been settled in the affirmative in this State, nor in any other State in this Union, nor in the Supreme Court of the United States; but, on the contrary, that whenever the question has been raised, it has been determined in the negative. With respect to our own State, the question has not been settled either way directly, though there are some cases in which it has incidentally occurred; but from them nothing favorable to such assignments can be inferred." Ogden *v.* Saunders, 12 Wheat. 213; Dawes *v.* Head, 3 Pick. 128; Dawes *v.* Boylston, 9 Mass. 337; Milne *v.* Moreton, 6 Binn. 353; Blanchard *v.* Russell, 13 Mass. 1; Harrison *v.* Sterry, above cited, again reported, Bee, 244; the comments of *Parker*, C. J., on Goodwin *v.* Jones, 3 Mass. 514, in 6 Pick. 305; Ward *v.* Morris, 4 Harris & McH. 330; Holmes *v.* Remsen, 20 Johns. 229, *Platt*, J., reversing the decision of *Kent*, Ch., in Holmes *v.* Remsen, 4 Johns. Ch. 460; Wallace *v.* Patterson, 2 Harris & McH. 463; *Ex parte* Franks, 1 Cooke's Bankrupt Laws, 336; Burk *v.* M'Clain, 1 Harris & McH. 236; Mawdesley *v.* Parke, in the court of Rhode Island, cited in Sill *v.* Worswick, 1 H. Bl. 680; Topham *v.* Chapman, 3 Consist. R. 285; Jones *v.* Blanchard, cited in the last case; Taylor *v.* Geary, Kirby, 313; *Ex parte* Blakes, 1 Cox, 398, a case in Virginia, cited in Waring *v.* Knight, 1 Cooke's B. L. 307; Richards *v.* Hudson (in Virginia), cited 4 T. R. 187; Ward *v.* Morris, 4 Harris & McH. 330, in the notes. See also, the intimations of the courts in the early American cases; Van Raugh *v.* Van Arsdaln, 3 Caines, 154; Bird *v.* Pierpont, 1 Johns. 118; Proctor *v.* Moore, 1 Mass. 198; Baker *v.* Wheaton, 5 id. 509; Watson *v.* Bourne, 10 id. 337; Ingraham *v.* Geyer, 13 id. 146; Walker *v.* Hill, 17 id. 383; the comments of *Parker*, C. J., on these cases, in Blake *v.* Williams, above cited; Smith *v.* Smith, 2 Johns. 235; Bird *v.* Caritat, id. 342; Abraham *v.* Plestoro, 3 Wend. 538; Johnson *v.* Hunt, 23 id. 90; Lord *v.* Brig Watchman, Ware, 232; Borden *v.* Sumner, 4 Pick. 265; Saunders *v.* Williams, 5 N. H. 213; Mitchell *v.* M'Millan, 3 Mart. (La.), 676; Olivier *v.* Townes, 14 id. 93; Norris *v.* Mumford, 4 id. 20; Fall River Iron Works *v.* Croade, 15 Pick. 11; Fox *v.* Adams, 5 Greenl. 245. Chancellor *Kent*, in his Commentaries, admits that his opinion in Holmes *v.* Remsen cannot now be held to be the law in America. 2 Kent, 408, in the note; Merrick's Estate, 4 Ashm. 485; Lowry *v.* Hall, 2 Watts & S. 129; Mullikin *v.* Aughinbaugh, 1 Penn. 117; Goodall *v.* Marshall, 11 N. H. 88; McNeil *v.* Colquhoon, 2 Hayw. 24; Robinson *v.* Crowder, 4 McCord, 519; the recent and instructive cases, May *v.* Breed, 7 Cush. 15; Towne *v.* Smith, 1 Woodb. & M. 115; Sanderson *v.* Bradford, 10 N. H. 260–264. In the case of Eliver *v.* Beste *et al.* the Supreme Court of Missouri held, that where the plaintiffs and defendants were citizens of another State, where the defendants had made an assignment in favor of their creditors in accordance with the laws of that State, one of the creditors, a citizen of that State, cannot secure a preference over the other creditors in his own State, by process of attachment against the property of the insolvent in Missouri. As against such attachment, the title of the assignee will prevail. Eliver *v.* Beste *et al.* 32 Mo. 240.

(z) This limitation is laid down in many of the cases in the preceding note, expressly or by implication, as in Blake *v.* Williams, 6 Pick. 286. See Towne *v.* Smith, 1 Woodb. & M 115, 136; The Watchman, Ware, 232; Merrick's Estate

Real property has a *lex loci*, a positive locality, and must be governed in all matters relative to its transfer by the laws of that locality. This must be admitted in England, as well as here; and would be so the more readily because it is so seldom — more seldom there than here — treated as merchandise. (*a*) But if an American, owning land in New York, and residing and trading in London, became bankrupt there, while his New York land certainly would not pass to his English assignee by his bankruptcy, it could be transferred to an American in trust for his assignee, for the benefit of his creditors, by his deed regularly and in good faith executed, delivered, and recorded, before any attachment or other process in this country. (*b*)

2 Ashm. 485. In May *v.* Breed, 7 Cush. 15, the facts of which have been stated, *ante*, *Shaw*, C. J., said: "We have been strongly pressed by the argument, that inasmuch as assignees of an English bankrupt cannot sue for and recover debts due the bankrupt, therefore the bankrupt law has no extra-territorial operation, and cannot give effect to a certificate of discharge, when set up here in bar by an English bankrupt. But we cannot perceive the force of this reasoning. The two things are not irreconcilable; they stand on different grounds, and depend on different and distinct principles. Though the point has long been doubted, we consider it now settled by a preponderance of authority, that when a debt due by an American merchant to an English bankrupt is attached by an American creditor of the English bankrupt, by a trustee process or process of foreign attachment, the assignee of the English bankrupt cannot come in and interpose such assignment to defeat such attachment, and claim the assets as by a prior title. But this is the extent to which the authorities go. It by no means follows that the English law has no effect here. On the contrary, we think it would enable the assignee to take possession of, and appropriate to the use of the creditors, personal property not attached, or otherwise subject to any lien, under our laws; and also to collect and receive all moneys due the bankrupt, and give a good discharge therefor, and sue for and recover them, either in their own name or in the name of the bankrupt, if not attached or held by any process or lien by any other creditor."

(*a*) Story on Conflict of Laws, §§ 20, 364, 414; M'Cormick *v.* Sullivant, 10 Wheat. 202; Ingraham *v.* Geyer, 13 Mass. 147; Rogers *v.* Allen, 3 Ohio, 488; Osborn *v.* Adams, 18 Pick. 245. Sir *William Grant*, in Curtis *v.* Hutton, 14 Ves. 537, 541, said: "The validity of every disposition of real estate must depend upon the law of the country where that estate is situated." In Oakey *v.* Bennett, 11 How. 33–45, Mr. Justice *McLean*, delivering the opinion of the court, said: "But it is an admitted principle, in all countries where the common law prevails, whatever views may be entertained in regard to personal property, that real estate can be conveyed only under the territorial law. . . The same rule prevails generally in the civil law. This doctrine has been uniformly recognized by the courts of the United States, and by the courts of the respective States. The form of conveyance adopted by each State for the transfer of real property must be observed. This is a regulation which belongs to the local sovereignty."

(*b*) See the cases cited in the preceding notes.

SECTION IV.

OF THE TRIBUNAL AND JURISDICTION.

In England, since the beginning of the reign of William IV., there have been judges and commissioners in bankruptcy, constituting a regular court, with all the usual powers and incidents. Each judge and commissioner may sit alone to hear applications, and issue the proper processes, and for that purpose may decide the questions which come before him; and upon questions of fact, may order a jury. Questions of law go by appeal to the Lord Chancellor, and finally to the House of Lords. (*c*)

In this country, the bankrupt law gave jurisdiction in these cases to the district judges of the United States. (*d*) But com-

(*c*) There would seem at one time to have been a question, under what authority the Lord Chancellor exercised a power in cases of bankruptcy, whether under the general duties of his office, as the head of a court of equity, or by virtue of special authority conferred upon him by statutes of bankruptcy. An examination of the authorities on this subject tends to show clearly that this power comes from the latter; and that although he exercises great discretionary powers in superseding commissions, and regulating proceedings under them, all his power is nevertheless derived from the statutes; he has none as a chancery court, or by virtue of his office as chancellor, and that the two jurisdictions are entirely separate and distinct; that the extraordinary authority which has been sometimes exercised, was so exercised, not by virtue of chancery power, but as conferred by implication of the statute. See on this subject, *Ex parte* Lund, 6 Ves. 781; Phillips *v.* Shaw, 8 id. 250; *Ex parte* Dewdney, 15 id. 496; *Ex parte* Cawkwell, 19 id. 233; Anonymous, 14 id. 449; *Ex parte* Thompson, 1 Glyn & J. 308; Ford *v.* Webb, 3 Brod. & B. 243; *Ex parte* Glanfield, 2 Glyn & J. 387; *Ex parte* Smith, 19 Ves. 474; Wilkinson *v.* Diggel, 1 B. & C. 160; *Ex parte* Dufrene, 1 Rose, 333; Eden on B. Law, 449, in Law Lib. vol. 34.

(*d*) The jurisdiction conferred by the National Law of Bankruptcy on the district judges was greater than that exercised by the Lord Chancellor. In *Ex parte* Foster, 2 Story, 131, *Story*, J., alluded to the matter of jurisdiction as follows: "And here I lay it down as a general principle, that the district court is possessed of the full jurisdiction of a court of equity over the whole subject-matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief which a court of equity could administer, under the like circumstances, upon a regular bill, and regular proceedings, instituted by competent parties. In this respect the act of Congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States than the Lord Chancellor, sitting in Bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in Bankruptcy, or sitting in the Court of Chancery, under his general equity jurisdiction, the courts of the United States are, by the Act of 1841, competent to do." See, on the point of the jurisdiction of the district courts, the learned opinion of

missioners were appointed in every part of each district, who could receive applications, and take proof, and send it to the district judge. In that court the assignee was admitted and authorized, and all trials took place there, and a jury was summoned whenever the district judge thought proper to require one.

The State insolvent laws differ in these particulars considerably. Generally, however, judges of probate, masters in chancery, or commissioners of insolvency, sit in fact as a court, and issue process, and hold meetings, and try and decide questions, with power to send the questions of fact to a jury if necessary, and with an appeal in matters of law to the Supreme Court of law or equity. (*e*)

Of the proceedings we shall speak in other sections. But it may be remarked here, that the statutes generally provide for a convenient resort to the court, and for proceedings of sufficient rapidity, without unsafe haste. And that the community are satisfied with the character and results of these proceedings very generally, may be inferred from the infrequency of appeals.

SECTION V.

WHO MAY BE BANKRUPTS OR INSOLVENTS.

We have seen that in England, until very recently, and under our last National Bankrupt Law, all persons owing debts could become *insolvents*; (*f*) or by their own action, have the benefit of

Hopkinson, J., in the Eastern District of Pennsylvania, in the case of Robert Morris, reported 1 Law Reporter, 354.

(*e*) In 1856, the Legislature of Massachusetts provided by statute for judges of insolvency, each of whom should have his registrar, and hold a regular court at stated periods. It may, however, be presumed that the practice will not vary essentially from what it has been under the commissioners of insolvency.

(*f*) It has been already said, and will be seen from the following section of the late United States Bankrupt Act, that the old distinction between bankruptcy and insolvency was so far maintained therein that traders could be compelled, and other debtors could apply, to go into insolvency, and it would seem, from the reasons which have heretofore governed legislators in reference to this distinction, that it may be expected to be found recognized in any future national bankrupt act. The first section of the late act provided as follows: "All persons whatsoever, residing in any State, District, or Territory of the United

the law. But that none could be made *bankrupts*, against their will and at the suit of others, who were not traders, or quasi

States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief, a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights, and credits, of every name, kind, and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court; all persons being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting, in the whole, to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, namely: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, district, or territory, of which he is an inhabitant, with intent to defraud his creditors, or shall conceal himself to avoid being arrested, or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, or sequestrated, or taken in execution, or shall remove his goods, chattels, and effects, or conceal them to prevent their being levied upon, or taken in execution, or by any other process, or make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods or chattels, credits, or evidence of debt." Upon this section of the statute it was clear that debtors of two classes were debarred from the privileges of the act — those owing the United States for default in office, and those owing debts in any fiduciary capacity. It was further clear, that no person owing debts of either of these classes, and no other, could be declared a bankrupt. But a question arose, whether a person owing such a debt as those above mentioned, and also being a debtor in his ordinary business capacity, was debarred the privileges of this act, from the fact of the existence of such fiduciary debt. The question was differently decided in different courts; but we are convinced, on the reason of the case, that the existence of such debts ought not to be a bar as to the others, though with great deference to the high authority which has adopted the contrary view. In the matter of John Hardison, 5 Law Reporter, 255, in the Circuit Court of the United States, Eastern District of Virginia, Mr. Justice *Daniel*, regretting that there was no English authority to aid in the solution of the question, *held*, that a party cannot be decreed a bankrupt while owing any debt created in consequence of defalcation as a public officer, or whilst acting in any fiduciary capacity, although he may owe other debts not of such character. A similar doctrine was maintained in the District Court of the Western District of Virginia, by Mr. Justice *Pennybacker*. In the matter of Cease, 5 Law Reporter, 408. On the other hand, in the District Court of Connecticut, *Judson*, J., *held*, that the existence of fiduciary debts would not prevent a claim as to other debts. In the matter of Young, 5 Law Reporter, 128. So in the Circuit Court, at Cincinnati, In the matter of Lord, 5 Law Reporter, 258. The same doctrine was maintained in the Southern District of New York, In the matter of Brown, 5 Law Reporter, 258. And by *Story*, J., in the Circuit Court for the first circuit, In the matter of Tebbetts, 5 Law Reporter, 259. Chapman *v.* Forsyth, 2 How. 202; Hayman *v.* Pond, 7 Met. 328; Morse *v.* Lowell, id. 152. And see Gilbert *v.* Hebard, 8 id. 129. The effect of the discharge in bankruptcy upon such debts, will be considered under the subject of Discharge, *infra*. In addition to the excepted cases in the statute, it appears that the court will exercise the power of dismissal of a petition to be decreed a

traders. There have been many nice questions and much conflict, as to who were traders in this sense. (*g*) But no such

bankrupt, when, in their opinion, the ends of Justice require it; for in the matter of Cotton, 6 Law Reporter, 546, it was *held*, that where a petitioner for a decree in bankruptcy set forth in his schedule only two debts, one of which was a judgment recovered against him on a bastardy process, and the other was a judgment in favor of the father for the seduction of his daughter, the petition should be dismissed. It could hardly be successfully contended that these were debts contracted in a fiduciary capacity.

(*g*) This conflict has been much greater in England than in this country, and the decided cases are more numerous there. We give the enumeration which occurs in the latest English statute on the subject, and leading cases upon the various classes. Section 65 of the statute 12 & 13 Vict. on this subject, provides: § 65. "That all alum-makers, apothecaries, auctioneers, bankers, — *Ex parte* Wilson, 1 Atk. 218; *Ex parte* Wyndham, 1 Mont. D. & D. 146; *Ex parte* Hall, 3 Deac. 405; *Ex parte* Brundrett, 2 id. 219; *Ex parte* Brown, 2 Mont. D. & D. 758. Bleachers, brokers, — Pott *v.* Turner, 6 Bing. 702; Highmore *v.* Molloy, 1 Atk. 206; Rawlinson *v.* Pearson, 5 B. & Ald. 124; *Ex parte* Stevens, 4 Madd. 256; *Ex parte* Phipps, 2 Deac. 487; *Ex parte* Harvey, 1 id. 570, 2 Mont. & A. 593; Hankey *v.* Jones, Cowp. 745; *Ex parte* Gem, 2 Mont. D. & D. 99; *Ex parte* Moore, 2 Deac. 287. Brickmakers, — Wells *v.* Parker, 1 T. R. 34; Sutton *v.* Weeley, 7 East, 442; *Ex parte* Harrison, 1 Bro. C. C. 173. Builders, — *Ex parte* Neirinckx, 2 Mont. & A. 384; *Ex parte* Edwards, 1 Mont. D. & D. 3; *Ex parte* Stewart, 18 L. J. Bankr. 14; Stewart *v.* Sloper, 3 Exch. 700. Calenderers, carpenters, — Cooke, B. L. 49; Chapman *v.* Lamphire, 3 Mod. 155; Kirney *v.* Smith, 1 Ld. Raym. 741. Carriers, cattle or sheep salesman, — *Ex parte* Newall, 3 Deac. 333. Coach proprietors, — *Ex parte* Walker, 2 Mont. & A. 267; Martin *v.* Nightingale, 11 J. B. Moore, 305. Cow-keepers, — Carter *v.* Dean, 1 Swanst. 64; *Ex parte* Deering, 1 De Gex, 398. Dyers, fullers, keepers of inns, — Patman *v.* Vaughan, 1 T. R. 572; Smith *v.* Scott, 9 Bing. 14; *Ex parte* Birch, 2 Mont. D. & D. 659. See also, *Ex parte* Willes, 2 Deac. 1; *Ex parte* Bowers, id. 99; Gibson *v.* King, 10 M. & W. 667; King *v.* Simmonds, 12 Jur. 903; *Ex parte* Daniell, 7 id. 334. Taverns, hotels, or coffee-houses, lime-burners, livery-stable keepers, — *Ex parte* Lewis, 2 Deac. 318; Cannan *v.* Denew, 10 Bing. 292. Market-gardeners, — *Ex parte* Hammond, 1 De G. 93; also, Carter *v.* Dean, 1 Swanst. 64. Millers, packers, printers, shipowners, — *Ex parte* Bowes, 4 Ves. 162; *Ex parte* Wiswould, Mont. 263. Shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of scrivener, receiving other men's moneys or estates into their trust or custody, — Adams *v.* Malkin, 3 Camp. 538; Lett *v.* Melville, 3 Man. & G. 52; Hamson *v.* Harrison, 1 Esp. 555; *In re* Lewis, 2 Rose, 59; Hurd *v.* Brydges, Holt, N. P. 654; *In re* Warren, 2 Sch. & L. 414; Hutchinson *v.* Gascoigne, Holt, N. P. 507; *Ex parte* Bath, Mont. 82; *Ex parte* Gem, 2 Mont. D. & D. 99. Persons insuring ships or their freight, or other matters, against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross, or by retail, and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, — *Ex parte* Herbert, 2 Rose, 248; Hale *v.* Small, 2 Brod. & B. 25; Parker *v.* Wells, Cooke, 58; Summersett *v.* Jarvis, 3 Brod. & B. 2; Bolton *v.* Sowerby, 11 East, 274; Patten *v.* Browne, 7 Taunt. 409; *Ex parte* Salkeld, 3 Mont. D. & D. 125; *Ex parte* Atkinson, 1 Mont. D. & D. 300; Dally *v.* Smith, 4 Burr. 2148; Heanney *v.* Birch, 3 Camp. 233; Port *v.* Turton, 2 Wilson, 169; Paul *v.* Dowling, 3 C. & P. 500; *Ex parte* Burgess, 2 Gill & J. 183; Heane *v.* Rogers, 9 B. & C. 577; *Ex parte* Bowers, 2 Deac. 99; *Ex parte* Wiswould, Mont. 263; Patman *v.* Vaughan, 1 T. R. 572; *Ex parte* Cromwell, 1 Mont. D. & D. 158; *Ex parte* Blackmore, 6 Ves. 3; Hankey *v.* Jones, Cowp. 748; Bolton *v.* Sowerby, 11 East, 274; Gale *v.* Halfknight, 3 Stark. 56; *Ex parte* Lavender, 4 Deacon & C. 487; Valentine *v.* Vaughan, Peake, 76; Newton *v.* Trigg, Salk. 109, Mayo *v.* Archer, 1 Stra. 513; Stewart *v.* Ball, 2 N. R. 78; Cobb *v.* Symonds, 5 B. & Ald. 516; Saunderson *v.* Rowles, 4 Burr. 2066; *Ex parte* Meymot, 1 Atk. 196; Millikin *v.* Brandon, 1 C. & P. 380; Colt *v.* Nettervill, 2 P. Wms. 308. Or by

distinction exists in our State insolvent laws; and even in England it has lost somewhat of its importance. We say, however, generally, that here all persons may be insolvents; and where the State statutes permit process *in invitum*, it permits it against all classes or kinds of debtors.

There must, of course, be some exceptions to this rule. One wholly and always a lunatic cannot become an insolvent, either on his own application, or that of a creditor. But if one who incurs debts, and is unable to pay them, becomes a lunatic, process may now issue, and the usual proceedings be had for the benefit of the creditors. (*h*)

As all the acts of an infant, in the way of trading, are voidable by him, it follows that a decree declaring him to be a

buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt; provided, that no farmer, grazier, common laborer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading company established by charter or act of parliament, shall be deemed, as such a trader, liable to become bankrupt." The meaning of the word trader was well set forth by Mr. Justice *Thompson*, in the Circuit Court of the United States. Wakeman *v.* Hoyt, 5 Law Reporter, 310. The doctrine of the court was, that any person engaged in business, requiring the purchase of articles to be sold again, either in the same or in an improved shape, must be regarded as using the trade of merchandise, within the intent of the bankrupt law. The learned opinion of *Conckling*, J., In the matter of Eeles, 5 Law Reporter, 273, where he *held*, that a distiller, who bought grain and converted it into alcohol, and sold the alcohol, was a trader.

(*h*) It seems to be well settled, that a lunatic, while in an insane condition, cannot bind himself by contract, unless the contract be for necessaries. Gore *v.* Gibson, 13 M. & W. 627; Neill *v.* Morley, 9 Ves. 478; McCrillis *v.* Bartlett, 8 N. H. 569; Richardson *v.* Strong, 13 Ired. 106; Baxter *v.* Earl of Portsmouth, 5 B. & C 170, and the cases cited in them; or where a contract is made with him, under such circumstances that the other party did not know his lunacy, and took no advantage, and the contract is so far executed as to render it impossible to restore the parties to their original condition. Molton *v.* Camroux, 4 Exch. 17. And see Jackson *v.* King, 4 Cowen, 207; Hall *v.* Warren, 9 Ves. 605; Pitt *v.* Smith, 3 Camp. 33; Stock on Lunacy, p. 38; Browning *v.* Reane, 2 Phillim. Doc. Com. 69; *Ex parte* Clarke, 2 Russ. 575; Turner *v.* Meyers, 1 Hagg. Consist. 414; Capper *v.* Dando, 2 A. & E. 458; Sander *v.* Sander, 2 Collyer, 276; Countess of Portsmouth, *v.* Earl of Portsmouth, 1 Hagg. Eccl. 355; Weaver *v.* Ward, Hobart, 134; Stephens *v.* De Medina, 4 Q. B. 422; Biffin *v.* Yorke, 6 Scott, N. R. 233; Woods *v.* Reed, 2 M. & W. 784; Groom *v.* Thomas, 2 Hagg. Eccl. 436. We are aware of no case in which it has been sought to charge a lunatic in bankruptcy for such debts. In Layton, *ex parte*, 6 Ves. 434, Lord *Eldon* said, making no distinction in the cases, that where one partner is a lunatic, there cannot be a joint commission against the others, but separate commissions must be issued. In this case, however, it does not appear that the debts were contracted by the lunatic partner while *compos mentis*. It cannot, therefore, be considered an authority against the doctrine of the text. And in Anonymous, 13 Ves. 590, the same Lord Chancellor held, that when the bankrupt had become lunatic, and no affidavit yet provided in support of the petition, a commission of lunacy will not protect the lunatic against an action; and a commission of bankruptcy is a species of action against which the lunacy cannot be a defence. Barnesley *v.* Powell, Ambl. 102.

bankrupt, would be void. (*i*) But it has been held, that if he had held himself out as of full age, and had traded as such, he might be decreed a bankrupt. (*j*)

If a married woman act, lawfully, as sole, incur debts, give notes, or carry on trade in a way or on grounds to relieve the husband from liability, there seems no reason, and no rule of law, which would prevent her from being proceeded against, or from proceeding, as an insolvent. (*k*)

SECTION VI.

OF THE ASSIGNEES.

In this country, the assignees are not official persons, but are appointed by the creditors at a regular meeting. (*l*) The

(*i*) Barwis, *ex parte*, 6 Ves. 601; Barrow, *ex parte*, 34 id. 554; Henderson, *ex parte*, id. 163; *Ex parte* Adam, 1 Ves. & B. 494; Stevens *v.* Jackson, 4 Camp. 164, 6 Taunt. 106; *Ex parte* Moule, 14 Ves. 603; O'Brien *v.* Currie, 3 C. & P. 283; Belton *v.* Hodges, 9 Bing. 366; Thornton *v.* Illingworth, 2 B. & C. 826; Mason *v.* Denison, 15 Wend. 64; *Ex parte* Sydebotham, 1 Atk. 146. "No man can be a bankrupt for debts which he is not obliged to pay." Per Lord *Holt*, Rex *v.* Cole, 1 Ld. Raym. 443. Whether an infant may be declared an insolvent on his own petition, was doubted, in the matter of Cotton, 6 Law Reporter, 546. Yet we see not why he may not adopt that method of ratifying his obligation as well as any other. The opinion of the court is stated absolutely, and without reasons given. It may be that it went on the ground of the invalidity of infants' contracts, or the duty of the court to pronounce them void or binding, according as they were for his benefit. But at this day it is clear that no debts of an infant are void, but simply voidable at his election. See notes and authorities on this subject in the chapter on Infants, and especially the discriminating remarks of *Bell*, J., on the vague and indefinite use of the words void and voidable, in State *v.* Richmond, 6 Foster, 232. It is further clear, that a contract completed by the transfer of the consideration on both sides, cannot be avoided by the infant, without a return of the property, at least, he has acquired by the contract. This being so, and insolvency being but a means of paying dues, it seems that it might be expected that American authority would differ from the English, insolvency being a voluntary act, and that an infant might be declared insolvent on his petition.

(*j*) *Ex parte* Watson, 16 Ves. 265; *Ex parte* Bates, 2 Mont. D. & D. 337.

(*k*) La Vie *v.* Philips, 1 W. Bl. 570; *Ex parte* Carrington, 1 Atk. 206. So the wives of convicts may be deemed bankrupts, and on a similar principle. *Ex parte* Franks, 7 Bing, 762. In Megrath *v.* Robertson, 1 Desaus. 445, it was held that a wife may become a sole trader by permission of her husband, even without deeds, and she becomes entitled to all her earnings as her separate estate. King *v.* Paddock, 18 Johns. 141; Baker *v.* Barney, 8 id. 72. The cases are numerous where it has been held, partly under statute law and partly by decisions of the courts, that a married woman may become trader, and under certain circumstances be liable, and entitled to the same process as if sole. They will be found collected in the notes to page 306 of the first volume of this work.

(*l*) And where this power is vested in the creditors, we know no reason why they

court or commissioner may appoint assignees when the creditors do not, or when the purposes of the assignment require them to do so. (*m*) Assignees are not removable by a vote of the creditors, nor by the court, or any tribunal, but for cause shown. But the proper tribunal must listen to any proper application by the creditors, or any part of them, for his removal, and must ascertain whether there be sufficient cause; and generally may remove if such cause exist, and is judicially known by them, without application. But these matters are all regulated by the different statutes, and with great variety. (*n*)

may not exercise it in the freest possible manner, and elect whomsoever they please to the office of assignee. By provision of many of the statutes, the power of rejection is vested in the commissioners. The consideration, whether the person chosen is or is not a creditor of the bankrupt estate, should have no weight in inducing the commissioner to reject. *Ex parte* Greignier, 1 Atk. 91; *In re* Litchfield, id. 87; Jackson *v.* Irvin, 2 Camp. 48. But Lord *Eldon* placed this limitation on the power of the creditors to elect whom they pleased; that they should not elect the bankrupt to be assignee of his own estate, on the ground of the great inconvenience attending such a relation. *Ex parte* Jackson, 2 Rose, 221. And it has been said that neither the solicitor to the commissioner, nor his partner, could be elected. Ex *parte* Rice, Mont. 259; *Ex parte* Badcock, Mont. & McA. 231. And in *Ex parte* Lacey, 6 Ves. 625, Lord *Eldon* said, that the banker receiving the money under the bankruptcy, ought not to be assignee. But a solvent partner could be. *Ex parte* Stoveld. 1 Glyn & J. 303.

(*m*) In some of the statutes, provision is made for the appointment of assignees by the court, without reference to the preference of the creditors. See § 3 of the late National Bankrupt Act. And where such power is vested in the court, no person ought to be appointed who is interested in the bankrupt's estate, or, at least, has an interest adverse to that of the creditors. *Ex parte* De Tasted, 1 Rose, 324; *Ex parte* Surtees, 12 Ves. 10; *Ex parte* Townshend, 15 id. 470; *Ex parte* Shaw, 1 Glyn & J. 127; Shelton *v.* Walker, 10 Law Reporter, 124. *Shaw*, C. J., in this case said: The grounds of complaint against the assignee in this case, were, that he had exercised undue influence in procuring his appointment as assignee; that his interests were adverse to those of the other creditors; and that he had used improper means to secure his claims against the insolvent. It had been decided in England, that one who had an adverse interest, or who pursued his interest in opposition to that of the creditors generally, was an unfit person to be assignee. It was not merely on account of the large amount of the demand for which the assignee might be interested; for all creditors might be supposed to have opposing interests in their claims upon an insolvent estate. But to disqualify him, he must be in such a situation as to be under temptation to secure himself from a scrutiny to which he would have been subjected had another been assignee, or he must have manifested some intention to use his position to obtain some undue advantage.

(*n*) If, accidentally, a large proportion of the creditors have been absent at the choice of the assignee, a new choice may be ordered. *Ex parte* Greignier, 1 Atk. 90; *Ex parte* Hawkins, Buck, 520; *Ex parte* Dechapeaurouge, 1 Mont. & McA. 174; *Ex parte* Edwards, Buck, 411. And if, after choice made, the commissioner should decide that the person chosen is, for any reason, unfit for the discharge of the duties, and refuse to admit him to the care of the estate, an appeal lies to the Supreme Court of Bankruptcy. *Ex parte* Candy, 1 Mont. & McA. 197. And the court also in general has power to remove an assignee who proves incompetent, from any reason, to discharge his office; or if there has been a fraud in procuring the appointment. In *Ex parte* Shaw, 1 Glyn & J. 156, Lord *Eldon* said: "Assignees owe a duty to every creditor, and each creditor owes a

These statutes also, to a considerable extent, define or declare his duties and his powers. Many cases have arisen in which

duty to the other creditors. With respect also to the solicitors under the commission, I can only say, that it sometimes happens that the best men are employed for parties having adverse interests; yet I cannot permit my observations to be closed, without saying that it is the duty of the solicitor employed by the bankrupt, if he find that he is employed by the assignees, to see that he can do his duty to every creditor, as well as to the bankrupt. If he is the agent of all, he must do his duty to each and all of them, however difficult it may be to discharge that duty. I must say, that I never saw proceedings in any bankruptcy in which there was a necessity for the interference of the court more imperious than in this; for whether Carroll can or cannot prove the rest of his debt (and it would be improper in me to express an opinion on that part of the subject, even if I had formed an opinion upon the merits of it), yet I cannot read the proceedings without observing, that the case calls for much adverse examination. I take into consideration all the other circumstances that have occurred, and without saying whether, if *I* were bound to decide this question merely upon the interposition of the bankrupt, I could get satisfactorily to the conclusion what were the motives which induced the nomination of these parties, after a laborious research into the evidence, I have no difficulty in stating that, taking the case altogether, if the nomination had been carried into execution by assignment, I should have been of opinion that Carroll stands under circumstances in which he should not be assignee." So if the assignee buy in the estate of the bankrupt, or a portion of it, the general rule is to remove him. *Ex parte* Alexander, 2 Mont. & A. 492. So the court will remove an assignee who converts to his own use the property of the bankrupt. *Ex parte* Townshend, 15 Ves. 470. The case was, a petition to remove assignees under a commission of bankruptcy, and to charge interest for money, part of the bankrupt's estate, received by one of the assignees, paid in at his banker's, to his own account, and used as his own property. The Lord Chancellor said: "Under these circumstances, therefore, the former assignees having been actually discharged for this very reason, using money, part of the bankrupt's estate, as their own, the new assignees chosen in execution of the principle respecting such use of the property, no substantial reason appearing for not having made this money the subject of dividend, being taken by this person, one of the new assignees, placed by him at his banker's, used as his own money, his clerk furnished with authority to draw it out as he pleased, and actually doing so, I must, by enforcing this rule, if possible, convince persons standing in the situation of trustees, as assignees in bankruptcy, that they are not to make use of the bankrupt's estate for their own private purposes. For that reason alone, I shall direct a meeting to be called for the purpose of choosing an assignee, instead of that one who has made this use of the property." And in an early case, *Ex parte* Haliday, 7 Vin. Abr. 77, where the commissioners of the bankrupt's estate had charged more than 20*s*. apiece at each meeting, and likewise ordered great sums to be charged for their eating and drinking, the Lord Chancellor declared them incapable of longer holding their office. *Ex parte* Reynolds, 5 Ves. 707. So if the assignee remove from the State in which the decree issued, or beyond the jurisdiction of the court by which the decree was issued. In *Ex parte* Grey, 13 Ves. 274, the Lord Chancellor said: "I am clearly of opinion that the assignee ought to be removed. He is trustee for the bankrupt and the creditors. Yet, whilst he is resident in Scotland, I have no hold over him, and can reach him with no process." And see *Ex parte* Leman, 13 Ves. 271. The cases are numerous in England, where the right of removal has been considered. In America, it seems to have been little discussed. We cite some of the leading and most instructive cases on this subject: *Ex parte* Rapp, 1 Deacon & Ch. 461; *Ex parte* Thorley, Buck, 231; *Ex parte* Copeland, 1 Mont. & A. 306; *Ex parte* Rolls, 3 id. 702; *Ex parte* Mills, 3 Ves. & B. 139; *Ex parte* De Tastet, 1 id. 280, 1 Rose, 324; *Ex parte* Morse, 1 De Gex, 478; *Ex parte* Nash, 1 Deacon & Ch. 445; *Ex parte* Barnett, 2 Mont., D. & De G. 692; *Ex parte* Shaw, 1 Glyn & J. 127, above cited; *Ex parte* Molineux, 3 Mont. & A. 703; *Ex parte* Candy, 1 Mont. & McA. 198; *Ex parte* Surtees, 12 Ves. 10, above cited; *Ex parte* Hawkins, Buck. 520;

questions relating to these rights and duties have been determined; and it may be well to speak of them at more length.

The assignees are the trustees of all the creditors; and are bound by the ordinary obligations of trustees in relation to the property in their own hands. (*o*) They cannot buy it in; nor acquire a title to it or to any part of it, by buying in shares or claims of creditors. (*p*) And if they make any gain out of any transaction in relation to it, the creditors may demand that this gain be added to the assets of the insolvent, and accounted for as a part of them. (*q*) So, too, the assignees are trustees of each

Ex parte Morris, 1 Deac. 498; *Ex parte* Edwards, Buck, 411; *Ex parte* Dechapeaurouge, 1 Mont. & McA. 174; *Ex parte* Spiller, 2 Mont., D. & De G. 43; *Ex parte* Stagg, id. 186; *Ex parte* Mendel, 4 Deac. & Ch. 725; *Ex parte* Perryer, 1 Mont., D. & De G. 276; *Ex parte* Reynolds, 5 Ves. 707; *Ex parte* Steel, 1 Deacon & Ch. 488; Shelton *v.* Walker, 10 Law Reporter, 124. But in general, in the later bankrupt laws, it is provided that assignees may be removed at discretion by the court. As in the late U. S. Bankrupt Law, "the court may exercise such power of appointment and removal at its discretion *toties quoties*."

(*o*) *Ex parte* Lacey, 6 Ves. 625; *Ex parte* Belchier, Ambl. 218; Belchier *v.* Parsons, 1 Kenyon, 44; *Ex parte* Wilkinson, Buck, 197; Primrose *v.* Bromley 1 Atk. 89; *In re* Earl of Litchfield, id. 87; *Ex parte* Lane, id. 90; Knight *v.* Plimouth, 3 id. 480; Adams *v.* Claxton, 6 Ves. 226; Raw *v.* Cutten, 9 Bing. 96; 1 Cooke, B. L. 263; *Ex parte* Read, 1 Glyn, & J. 77; and cases cited in the subsequent note.

(*p*) The contrary seems to have been held by Lord *Hardwicke*, in Whelpdale *v.* Cookson, 1 Ves. Sen. 9, stated from the Register's book in Campbell *v.* Walker, 5 Ves. 682. He confirmed a sale by the assignee to himself, in case the majority of the creditors should not dissent. But in *Ex parte* Lacey, 6 Ves. 625, Lord *Eldon* said: "With all humility, I doubt the authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the court arises from the difficulty of a *cestui que trust* duly informing himself what is most or least for his advantage. I have considerable doubt whether the majority in that article can bind the minority; the question does not arise upon the state of facts in this case." Lord *Eldon* expressly denies that the assignee can buy the estate of the bankrupt, and, going further, he says: "As to the purchase of debts by the assignee, as assignees cannot buy the estate of the bankrupt, so they cannot, for their own benefit, buy an interest in the bankrupt's estate, because they are trustees for the creditors." In *Ex parte* Tanner, 6 Ves. 630; *Ex parte* Attwood, id.; Owen *v.* Foulkes, id., the Lord Chancellor laid down the general rule, that no trustee shall buy the trust property until he strips himself of that character, or by *universal* consent has acquired a ground for becoming a purchaser; and added, that the rule is to be more peculiarly applied, with unrelenting jealousy, in the case of an assignee of a bankrupt, and that it must be understood, that whenever assignees purchase, they must expect an inquiry into the circumstances. *Ex parte* Reynolds, 5 Ves. 707; *Ex parte* Shaw, 1 Glyn & J. 127; *Ex parte* Steel, 1 Deacon & Ch. 488. And see Fox *v.* Mackreth, 2 Bro. C. C. 400, 2 Cox, 320; Whichcote *v.* Lawrence, 3 Ves. 740; Campbell *v.* Walker, 5 Ves. 678; *Ex parte* Hughes, 6 id. 617; Lister *v.* Lister, id. 631; *Ex parte* Morgan, 12 Ves. 6; *Ex parte* Hodgson, 1 Glyn & J. 14; *Ex parte* Lewis, id. 70; *Ex parte* Buxton, id. 357; *Ex parte* Bage, 4 Madd. 460. But in *Ex parte* Reynolds, 5 Ves. 707, it was held, that in case the subsequent sale did not produce as much as the assignee had given, he should then be bound by his wrongful purchase.

(*q*) This seems naturally to follow from their character as trustees. The general doctrine is clear (see the chapter on Trustees, vol. 1 of this work), that when the trustee has used trust funds for his own benefit, he shall be held liable to account for

creditor as well as of all the creditors. It would seem to follow therefore, that no assignee could protect himself against any claim or suit of any creditor by showing only that he had acted in obedience to a majority of the creditors, or of any number or proportion of them, however great. (*r*) It is, however, obvious, that there are some things which must be determined by the will of the majority, as who shall be assignee, and other important matters, concerning which it is impossible that every man should have his own way; and here the statute provides, accordingly, that the will of the majority, under certain precautions against fraud or oppression, should prevail. It may, however, be laid down as a rule, with scarcely an exception, that no assignee is *safe* in relying upon a majority vote or act, excepting in the very cases and the very way pointed out by the statutes. It is obvious, that if a majority had any *general* power, they might easily exert it to defeat the whole purpose of insolvent laws, which is equal justice to all.

It is one of the earliest duties of assignees to take possession and charge, without any delay, of the effects of the insolvent. And they would not only be responsible for any injury to this property while in their possession, if caused by their own default, but for any injury caused by a faulty delay in taking possession. (*s*)

An assignee has, however, a certain discretion in this matter. He is not bound to accept and receive what might prove to be a *damnosa hereditas*, or any thing of that kind. If the insolvent has, for example, leasehold property, the assignee *may* take it into his possession. But if it be incumbered with charges and obligations, he takes it *cum onere*, and must fulfil all these

the profits accruing to him from the same, and pay them over to the *cestui que trust*. If he refuse to account, and if the negligence and refusal is continued for a long period, he will be charged compound interest on the sum in his hands; and we see not why this same doctrine may not apply in case of bankrupt's assignees. Barney *v.* Saunders, 16 How. 535; Rowan *v.* Kirkpatrick, 14 Ill. 1; Jones *v.* Foxall, 15 Beav. 388, 13 Eng. L. & Eq. 140; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; Boynton *v.* Dyer, 18 Pick. 1, and numerous other cases, cited page 122 of the first volume, note (*f*).

(*r*) The cases cited in the three previous notes seem to establish this.

(*s*) This doctrine is laid down in all the text-books on this subject, and seems nowhere contradicted by the authorities. And usually statute provision is made for the purpose of enabling him to take possession, as in the late national act, that for this purpose the clerk should deliver to the assignee a certified copy of the decree.

obligations; and if these would make it cost more than it is worth, so that taking it would diminish rather than enlarge the funds to which the creditors look, he may, as their trustee, refuse to take it. (*t*) But then other parties, who have these charges and obligations against the debtor, may come in as creditors, if their claims are of a kind to be proved, and take their dividend. Neither can the assignee select or divide what he may thus take, if it be entire in itself. He cannot take it so far as it is good, and reject it as far as it is bad, but must do one or the other, altogether. (*u*) Indeed, it is a universal rule, that the assignee represents the insolvent, so far as to be subject to all the equities against him which attach to any effects in

(*t*) In Smith *v.* Gordon, 6 Law Reporter, 313, *Ware*, J., said: "By the bankrupt act, all the property and rights of property of the bankrupt, by force of the decree of bankruptcy, pass to the assignee by operation of law, and become vested in him as soon as he is appointed. But though the legal title passes, he is not bound to take possession of all. It is perfectly well settled with respect to leasehold estates, under the English bankrupt laws, that the assignee is not bound to take the lease, and charge the estate with the payment of rent. The rent may be greater than the value of the lease, and thus the estate may be burdened instead of being benefited by taking the lease, and in such a case the *damnosa hereditas* may be abandoned by the assignee. I have had occasion to consider this question in another case, and I came to the conclusion that this doctrine equally holds under our bankrupt law. *Ex parte* Whitman, December, 1842. And I take the principle to be a general one, that the assignee is not, at least ordinarily, bound to take into his possession property which will be a burden instead of a benefit to the estate. If the assignee elects a right not to take, the property remains in the bankrupt, and no one has a right to dispute his possession. His possessory title is good against all the world but his assignees. Thus, in this case, if the assignee elected not to take the right of the bankrupt and charge the estate with the costs of a suit in equity the issue of which was uncertain, the right, whatsoever it was, remained in the bankrupt, and might be pursued by any creditor who had not proved under the bankruptcy." Nias *v.* Adamson, 3 B. & Ald. 225; Wheeler *v.* Borman, 3 Camp. 340; Turner *v.* Richardson, 7 East, 335; Copeland *v.* Stephens, 1 B. & Ald. 593; Bourdillon *v.* Dalton, 1 Esp. 233; *Ex parte* Fuller, 2 Story, 327. And the cases allow him a reasonable time, in which to consider and decide whether he will take or not. If the assignee refuse to take possession, the title remains in the bankrupt, with the same rights of defence of title, and the same privilege to sue for damages to his possession, as if his remaining goods had not been distributed for the benefit of his creditors. Smith *v.* Gordon, above cited; Webb *v.* Fox, 7 T. R. 391; Fowler *v.* Down, 1 B. & P. 44; Turner *v.* Richardson, above cited. But if the assignee takes the property, he takes it *cum onere*, and is liable for covenants and incumbrances. Holford *v.* Hatch, Doug. 183; Corsbie *v.* Free, Craig & P. 64; Page *v.* Way, 3 Beav. 2; Pierce *v.* Thornely, 2 Sim. 167. See also, Bull. N. P. 159; Parker *v.* Webb, 3 Salk. 5; Harley *v.* King, 5 Tyrw. 692; Luxmore *v.* Robson, 1 B. & Ald. 584; Demarest *v.* Willard, 8 Cowen, 206; Taylor *v.* Shum, 1 B. & P. 21; Armstrong *v.* Wheeler, 9 Cowen, 88, Bac. Abr. Tit. Cor. But not if he abandons the possession, for the liability is only as perdurable as the possession. Valliant *v.* Dodemede, 2 Atk. 546; Pitcher *v.* Torcy, 12 Mod. 23; Armstrong *v.* Wheeler, above cited. Onslow *v.* Corrie, 2 Madd. 330; Wilkins *v.* Fry, 2 Rose, 371; Taylor *v.* Shum, 1 B. & P. 21; Eaton *v.* Jacques, Doug. 456.

(*u*) See cases cited in the preceding note.

the assignee's hands. (*v*) So he must make restitution of, or if trover be brought, refund in damages for any property he has taken as the insolvent's, to which some one else has a better title. (*w*)

Assignees must act jointly, neither having the power of both; nor can either or both delegate their power, or substitute others as assignees. (*x*) But they may employ attorneys or agents to act for them in all matters in which their own personal action

(*v*) In *Ex parte* Newhall, 2 Story, 360, *Story*, J., said: "I take the clear rule in bankruptcy to be, that the assignee takes the property and rights of property of the bankrupt, subject to all the rights and equities of third persons, which are attached to it in the hands of the bankrupt." And the language of *Erskine*, L. Ch., in *Ex parte* Hanson, 12 Ves. 346, is equally unqualified. "Here is a clear principle which decides this case, that assignees in bankruptcy take subject to all equities attaching upon the bankrupt; and on the condition of the bankrupts, if they had continued solvent, would, as between them and these persons, be such as I have represented, that must be the condition of the assignees." *Ex parte* Herbert, 13 Ves. 188; Mitford *v.* Mitford, 9 Ves. 100; Pope *v.* Onslow, 2 Vern. 286; Brown *v.* Heathcote, 1 Atk. 160, 162; Scott *v.* Surnam, Willes, 402; Leslie *v.* Guthrie, 1 Bing. N. C. 697; Fletcher *v.* Morey, 2 Story, 555; Mitchell *v.* Winslow, id. 630; Humphreys *v.* Blight, 1 Wash. C. C. 44; Stouffer *v.* Coleman, 1 Yeates, 399. In the matter of McLellan, 6 Law Reporter, 440; Talcott *v.* Dudley, 4 Scam. 427. See also, *Ex parte* Marsh, 1 Atk. 159; *Ex parte* Butler, id. 213; Clopham *v.* Gallant, 1 Com. Dig. 533; Howard *v.* Jemmet, 3 Burr. 1369; Winch *v.* Keely, 1 T. R. 619; Grant *v.* Mills, 2 Ves. & B. 309. In the matter of Muggridge, 5 Law Reporter, 351; *Ex parte* Copeland, 3 Deacon & Ch. 199; *Ex parte* Prescott, 1 Mont. & A. 316; *Ex parte* Flower, 2 id. 224; *Ex parte* Plant, 4 Deacon & Ch. 160; Griswold *v.* McMillan, 11 Ill. 591; Strong *v.* Clawson, 5 Gilman, 346. The assignee takes only the bankrupt's *beneficial* interest, Ontario Bank *v.* Mumford, 2 Barb. Ch. 596. The rule above stated is liable to no exception whatever except in case of fraud, which "vitiates every thing," and which, where it exists, prevents the operation of every general rule. *Story*, J., in the cases cited from 2 Story. The right always exists in the assignees of defeating any conveyance made by the bankrupt in fraud of his creditors or of the bankrupt laws. Williams *v.* Vermeule, 4 Sandf. Ch. 388.

(*w*) It seems that no authority under a decree in bankruptcy to take possession of the goods of A, would make a party the less a wrongdoer who should, under the color of that authority, seize the goods or estate of B, and assignees are to use great diligence in avoiding the seizing of property of persons other than the bankrupt; for in the case of *Ex parte* Cowan, 3 B & Ald. 123, it appeared that the assignees had seized as the property of the bankrupt a farm belonging to A B, and had kept it for a long time, and mismanaged it, and that the Lord Chancellor had referred it to a Master to take the account between A and B and the assignees in respect of such property and of its mismanagement, and afterwards, upon his report, had ordered a certain sum to be paid to A B by the assignees, the commission having been previously suspended. This was a motion for a prohibition to the Lord Chancellor. In support of the motion, the following authorities were relied on. Davy's case, Lord *Raymond*, 531; *Ex parte* Rowton, 17 Ves. 426; Eyre *v.* Jackson, 1 Chan. Rep. 229; Brymer *v.* Atkins, 1 H. Bl. 164; *Ex parte* Earl of Litchfield, 1 Atk. 88. But the court held, that the chancellor had not exceeded his jurisdiction in making the assignees personally liable, beyond the funds in their hands, for such mismanagement. In the matter of Cheney, 5 Law Reporter, 19.

(*x*) Williams *v.* Walsby, 4 Esp. 220; Lord Lovelace's case, Sir *W. Jones*, 268; Can *v.* Reed, 3 Atk. 695. See Smith *v.* Jameson, 1 Esp. 114; Bristow *v.* Eastman, id. 172.

is not necessary; (*y*) and their liability for the acts of their agents would be determined by the general principles of the law of agency. (*z*) They may sue in their own name, on the contracts or choses in action of the insolvent, which they take for the creditors. (*a*)

(*y*) This would seem to follow as a right incident to their character as trustees.

(*z*) It has been held, that if an assignee employs an agent in the conduct and management of the bankrupt's property, who misapplies and embezzles any part of the effects, the assignee will be liable to make it good, unless he had consulted the body of the creditors, who are his *cestui que trust*, in the appointment of such agent. In the matter of Earl of Litchfield, 1 Atk. 87. But it is clear that when the assignees employ a person, either from necessity, or conformity to the general usage of mankind, they are not then liable for losses, or for the default of such agents. Thus, where an assignee employed a broker to sell a quantity of tobacco, and the broker received the money, and in ten days failed without having paid it over, the assignee in this case was held not bound to make it good. *Ex parte* Belchier, Ambl. 218; Belchier *v.* Parsons, 1 Kenyon, 44. See *Ex parte* Wilkinson, Buck, 197; Deacon on Bankruptcy, 339. In Belchier *v.* Parsons, above cited, the duty and right of assignees in this matter are well set forth: "I am of opinion that there are no grounds to make Mrs. Parsons answerable in this cause for any more of the money than what she actually received. Were it once to be laid down, as a rule in this court, that an assignee, or trustee, should be answerable in all events for the people they employ, no man in his senses would ever undertake those offices. In the case of executors and administrators, the common law does, in most cases, consider the persons receiving by their directions only as the hands by which they receive; and this court, likewise, to preserve some consistency with the common law, does confine them to stricter rules, and what is a devastavit at law, must be so here. But in the case of trustees, and assignees particularly, who are acting immediately under the authority of this court, it has always admitted of greater latitude; nay, in the former case, this court, and sometimes even the courts of law, have dispensed with that rigor. In cases of this kind, it is not to be expected that the assignees will themselves attend the disposition of the bankrupt's effects, and less so still in the present case, from the sin of the person whom the creditors have thought proper to choose assignee; nor would it indeed be for the benefit of the creditors, if they did. Brokers, and such sort of people, being more conversant with the effects to be disposed of, are better judges of their value, and more capable of disposing of them to advantage."

(*a*) The following cases serve, perhaps, sufficiently to illustrate the doctrine of the text, showing the various kinds of actions which assignees have been permitted to bring: — Parker *v.* Manning, 7 T. R. 537; Bedford *v.* Brutton, 1 Bing. N. C. 399; Snellgrove *v.* Hunt, 1 Chitty, 71; Bloxam *v.* Hubbard, 5 East, 407; Kitchen *v.* Campbell, 3 Wilson, 304, 2 W. Bl. 827; Hewit *v.* Mantell, 2 Wilson. 872; Winter *v.* Kretchman, 2 T. R. 45; Vernon *v.* Hanson, id. 287; Noble *v.* Kersey, 4 C. & P. 90; Tennant *v.* Strachan, Moody & M. 377, 4 C. & P. 31; Waller *v.* Drakeford, 1 Stark. 481; Thomason *v.* Frere, 10 East, 418; Rawson *v.* Walker, 1 Stark. 361; Brandon *v.* Pate, 2 H. Bl. 308; Carter *v.* Abbott, 2 Dow & R. 575, 1 B. & C. 444; McKeon *v.* Caherty; Hurst *v.* Gwennap, 2 Stark. 306; Yates *v.* Carnsew, 3 C. & P. 99; Farrington *v.* Payne, 15 Johns. 431; Thompkin *v.* Haile, 3 Wend. 406; Smith *v.* Milles, 1 T. R. 475; Cooper *v.* Chitty, 1 Burr. 20; Menham *v.* Edmonson, 1 B. & P. 369; Rush *v.* Baker, 2 Stra. 996; Elderkin *v.* Elderkin, 1 Root, 139; Gray *v.* Bennett, 3 Met. 522; Wright *v.* Fairfield, 2 B. & Ad. 727; Partridge *v.* Hannum, 2 Met. 569; Smith *v.* Coffin, 2 H. Bl. 445; Day *v.* Laflin, 6 Met. 280; Mitchell *v.* Hughes, 4 M. & P. 577; Ward *v.* Jenkins, 10 Met. 583; Gibson *v.* Carruthers, 8 M. & W. 321; Brown *v.* Cuming, 2 Caines, 33; Porter *v.* Vorley, 9 Bing. 93; M'Menomy *v.* Feners, 3 Johns. 71; Edwards *v.* Coleman, 2 Bibb, 204; Kelly *v.* Holdship, 1 Browne, 36; Cornwell's Appeal, 7 Watts & S. 305; Burnside *v.* Merrick, 4 Met. 537; Hancock

They may transfer the notes of the insolvent, by indorsement or delivery, where the contract or obligation of the insolvent requires it. (*b*) But as a general rule, while assignees may transfer what they can by delivery, if negotiable paper requires indorsement, this should be made by the insolvent, who retains the power to make an indorsement which is necessary to carry into effect a previous contract. (*c*)

v. Caffyn, 8 Bing. 358; Hill *v.* Smith, 12 M. & W. 618; the instructive case, Moore *v.* Jones, 23 Vt. 739. Ejectment, — Barstow *v.* Adams, 2 Day, 70; Talcott *v.* Goodwin, 3 id. 264. It seems that if the cause of action arise before the bankruptcy, the assignee may sue, but must declare as assignee; if it arise after the bankruptcy, the assignee may now sue in his own right, and need not describe himself as assignee. When the bankrupt sells, or makes any contract respecting property *after* the commission, the assignees may, in that respect, treat him as their agent. Evans *v.* Mann, Cowp. 569; Thomas *v.* Rideing, Wightw. 65, 1 Rose, 121; Kiggil *v.* Player, 1 Salk. 111; and the cases cited, Deac. on Bankruptcy, 731. In the case of Evans *v.* Mann, the facts were that the bankrupt, after his bankruptcy, and before he had obtained his certificate, carried on his trade as a lighterman, and both built and sold lighters. He sold one to the defendant, who paid him part of the purchase-money; after which the assignees apply to the defendant for the value of the lighter; and so far affirm the contract as to enter into an agreement, by which they are content to be paid the residue of the purchase-money, after deducting what the bankrupt had received. And for this residue they have brought the action. The objection to the form of the action was, that the plaintiffs, being assignees under a commission, did not state themselves to be assignees in the declaration: "On consideration, there seems to be this distinction, — if the assignees bring an action on a contract made by the bankrupt, *before* his bankruptcy, they must state themselves in the declaration to be assignees. But here the contract was after bankruptcy, when the bankrupt could have no property of his own. The lighter was the property of the assignees; and consequently the sale by him a contract as their agent by operation of law, and on their account. Therefore it was not necessary that they should state themselves to be assignees in the declaration; though in respect of the evidence in support of the action, it might be incumbent on them to prove the trading, bankruptcy, &c.; in short, the whole case." As to the assignee continuing in his own name an action commenced in the name of the bankrupt, see Ames *v.* Gilman, 10 Met. 239; Smith *v.* Gordon, 6 Law Reporter, 313. The bankrupt may continue it, if the assignee make no objection, and be held as trustee for the assignee for the amount of the judgment. Clark *v.* Calvert, 8 Taunt. 742, and the cases reviewed. Sawtelle *v.* Rollins, 23 Me. 196. If the assignee is removed or die, the assignee who takes his place succeeds to his powers, and holds his place in court. Page *v.* Bauer, 4 B. & Ald. 345; Richards *v.* Maryland Ins. Co. 8 Cranch, 84; Hall *v.* Cushing, 8 Mass. 521; Merrick's Estate, 5 Watts & S. 9.

(*b*) *Ex parte* Mowbray, 1 Jac. & W. 428. This was a petition praying that assignees might be ordered to indorse a bill of exchange which had been transferred before his bankruptcy, for valuable consideration, but without indorsement; if the bill was not indorsed, the petitioner claimed to be a creditor for the amount. Lord Chancellor *Eldon* said: "The difficulty is, to frame an order which shall provide for a special indorsement, that will prevent the assignees from being personally liable. But if a special indorsement is made, and the petitioner will be content with it, I see no reason why I should not make the order; if he is not satisfied with that, he must apply again." See also, *Ex parte* Brown, 1 Glyn & J. 408; *Ex parte* Hall, 1 Rose, 13; *Ex parte* Rowton, id. 15.

(*c*) *Ex parte*, Greening, 13 Ves. 206; Watkins *v.* Maule, 2 Jacob & W. 243; Smith *v.* Pickering, Peake, N. P. 50; 1 Cooke's B. L. 295 (8th ed.); Owen on Bankruptcy, 72, 73, Archbold, 202; Wallace *v.* Hardacre, 1 Camp. 46; Anonymous, id. 492; Lempriere *v.* Pasley, 2 T. R. 485. It should be observed, how-

They may compound debts, redeem mortgages, compromise claims against or in favor of the insolvent, (*d*) and in general do whatsoever trustees may do. (*e*) And an assignee who acted in such matters in good faith and with reasonable discretion, would seldom be molested by the court. But it is always prudent for the assignees to obtain the specific instruction and sanction of the court, for whatever they may do in this way.

As assignees have, in general, the powers of trustees, so the responsibilities of trustees attach to them. (*f*) Many cases have arisen on this question, and it will often be difficult to apply to the facts of a particular case, the rules of law. But the difficulty cannot lie in those rules. The assignees are trustees and agents for compensation. They will, therefore, be held strictly for bad faith. But beyond this it is believed that they can be liable for lack of discretion, or for mistake, only where this amounts to negligence; not slight negligence, nor

ever, that matters of this sort are usually provided for by statute regulation.

(*d*) Robson *v.* ——, 2 Rose, 50; Dod *v.* Herring, 1 Russ. & M. 153; Richards *v.* Merriam, 11 Cush. 582. But assignees are not bound by the bankrupt's submission to arbitration. Marsh *v.* Wood, 9 B. & C. 659; Snook *v.* Hellyer, 2 Chitty, 43; Andrews *v.* Palmer, 4 B. & Ald. 250. And in referring disputes to arbitration, the assignees, for their own security, should protest against the reference being taken as an admission of assets; and if they refer *generally* without a protest of this kind, it will amount to such admission, and they will be *personally* liable to pay the sum awarded, as in the case of executors and administrators. Robson *v.* ——, above cited. See Deacon on Bankruptcy, 323, 324. On the subject of mortgages, see the following cases, where the right of redemption in the assignees, is allowed, and discussed. Higden *v.* Williamson, 3 P. Wms. 132; Pope *v.* Onslow, 2 Vern. 286; Taylor *v.* Wheeler, 2 id. 565; *Ex parte* Alsager, 2 Mont., D. & De G. 328; Pye *v.* Daubuz, 3 Bro. 595; *Ex parte* Hartley, 1 Deac. 288; *Ex parte* Cox, 2 Mont., D. & De G. 486; *Ex parte* Pettit, 2 Glyn & J. 47; *Ex parte* Berredge, 3 Mont., D. & De. G. 464; *Ex parte* Carr, 2 id. 534; *Ex parte* Living, 1 Deac. 1; *Ex parte* Wilson, 2 Ves. & B. 252; *Ex parte* Barnes, 3 Deac. 223; *Ex parte* Temple, 1 Glyn & J. 216. Mortgages of personal property, — Jones *v.* Gibbons, 9 Ves. 407; Ryall *v.* Rolle, 1 Atk. 165, 1 Ves. Sen. 348; Stephens *v.* Sole, 1 Ves. 752; Bourne *v.* Dodson, 1 Atk. 154; *Ex parte* Austin, 1 Deacon & Ch. 207; Doane *v.* Eddy, 16 Wend. 523; Murray *v.* Burtis, 15 id. 212. In this country, by the late national bankrupt cases, and in general in the State insolvent laws, power is given to the assignees of an insolvent to compound debts, arbitrate and redeem mortgages, on obtaining the approval of the court in that behalf. Generally, he should deposit all moneys collected in a bank of good credit, and to the account of the bankrupts' fund. *Ex parte* Reynolds, 5 Ves. 707; *Ex parte* Beaumont, 3 Deacon & Ch. 549.

(*e*) See cases cited *supra*, in notes (*o*) and (*p*).

(*f*) The liabilities of assignees in respect of negligence, and their duties as trustees, have been set forth in preceding notes. Especial reference is made to the case of Belchier *v.* Parsons, 1 Kenyon, 44, where this subject is treated at much length. Kinder *v.* Howarth, 2 Stark. 354; *Ex parte* Lane, 1 Atk. 90; *Ex parte* Turner, 1 Mont. & McA. 52; Knight *v.* Lord Plimouth, 3 Atk. 480. See especially, also, Raw *v.* Cutten, 9 Bing. 96, *Tindal*, C. J.

gross negligence; but the ordinary negligence for which bailees and trustees with compensation are usually liable. If this general rule has any peculiar modification in the case of assignees, it must be because the law points out precisely their course, and the court are always ready to direct them, and therefore a mistake is without excuse, and a slight mistake may imply great negligence.

SECTION VII.

WHAT REAL PROPERTY INSOLVENCY TRANSFERS TO THE ASSIGNEE.

The theory of the bankruptcy system is, that it places in the hands of the assignees *all* the property and effects of the bankrupt which can be made available for his debts; and renders unnecessary and therefore supersedes any other measures on their part. (*g*) The real estate of the bankrupt may be an important part of his property; and it all goes with the rest to his assignees.

It is a question of some little difficulty, or has been thought so in some cases, in what way or by what kind of transfer, the land goes to the assignees. It seems, however, to be now settled, that bankruptcy operates not so much as a grant or transfer, but rather as a sequestration or forfeiture. (*h*) No deed, or

(*g*) See Archbold on Bankruptcy; Cooke on the Bankrupt Law; Deacon on Bankruptcy; 2 Kent, Com. 390; Com. Dig. Tit. Bankrupt, D. (26); 2 Bl. Com. 285, 485; *Ex parte* Newhall, 2 Story, 360; In the matter of Cheney, 5 Law Reporter, 19; Clarke *v.* Minot, 4 Met. 346; French *v.* Carr, 2 Gilman, 664. As to the time at which the title to the bankrupt's property vests in his assignees, see *infra*, § 10.

(*h*) This must still be considered to a great extent matter for statute provision. In the earlier English statutes, and even in Stat. 6, Geo. IV. c. 16, provision was made for the conveyance of the estate of the bankrupt by the commissioners, with formal deeds, and further providing that until such conveyance, the act of bankruptcy and decree, and appointment of assignees, should have no operation or effect in passing the estate, and it was as essential that all formalities should be observed in the execution of the commissioners' deed as in that of a private person. See on the construction of the earlier statutes in this respect, and on the matter of the last note, — Perry *v.* Bowers, T. Jones, 196; Thomas *v.* Popham, Dyer, 218; Elliot *v.* Danby, 12 Mod. 3; Bennett *v.* Gandy, Carth. 178; Doe *v.* Mitchell, 2 M. & S. 446; Perry *v.* Bowes, 1 Vent. 360, s. c. 1 Show. 206; Bainbridge *v.* Pinhorn, Buck, 135; *Ex parte* Proudfoot, 1 Atk. 253; Jacobson *v.* Williams, 1 P. Wms. 383; Carleton *v.* Leighton, 3 Meriv. 667; Lummus *v.* Fairfield, 5 Mass. 249 See Com. Dig. as above

instrument of any kind is necessary to give title to the assignees. It is as completely his by the judicial record of bankruptcy and his appointment, as land is in England his who takes it by fine and common recovery. (*i*)

Nor is an inventory or schedule essential. (*j*) They are proper, and assist in defining the property and the title; but land, and interests in land, which were never entered upon the schedule, pass none the less to the assignee. And this applies to all interests in land vested in the bankrupt by any means whatever, whether of law or of the bankrupt's act. This rule will include equally all the rights or interests vested in him by contract, in respect to which the assignees have all his remedies, and among them that of specific performance, (*k*) and also

cited. See also, on the matter of sequestration, the important case of The Royal Bank of Scotland *v.* Cuthbert, 1 Rose, 462; Selkrig *v.* Davies, 2 Dow. 230. At this day, however, the provisions of the statutes of bankruptcy, usually are to the effect that the decree in bankruptcy sequestrates at once the property of the bankrupt, and leaves it in the hands of his assignees, without the necessity of grant. See the statutes of the States, and the provision of the late National Act; Carr *v.* Gale, Daveis, 328, 331.

(*i*) Burnside *v.* Merrick, 4 Met. 537; Dyer *v.* Clark, 5 id. 562; Howard *v.* Priest, id. 582.

(*j*) It is not unusual to insert a provision in insolvent laws, to the effect that a schedule shall be prepared by the debtor of his debts of all kinds, the persons to whom due, and whether collateral security has been given, verified by the oath of the debtor, and delivered to the assignees, but subject, under certain restrictions, to amendment. Such will be found in general to be the provision of the Massachusetts Statutes of Insolvency. The various statutes of this State will be found collected in Cutler's Insolvent Laws, — a hand-book of great convenience to the practitioner. But where such regulations are provided, they are matter of form and directory rather than of substance, and the property of the insolvent passes, without reference to them; but if not observed, the discharge may be refused. Jewett *v.* Preston, 27 Maine, 400. In the matter of Frisbee, 4 Law Reporter, 483; Downer *v.* Dana, 22 Vt. 337. In the case of Jewett *v.* Preston, *Whitman*, C. J., said: "The property of Preston, on his becoming bankrupt, vested in his assignee, who instantly thereupon became entitled to possession of it, and might have taken it from the bankrupt, or from any one else in possession of it. In fact, the possession of it by the bankrupt was the possession of the assignee, the bankrupt being but the keeper of it for the assignee. It was not necessary that it should be inserted in the bankrupt schedule in order to give the assignee such right. The bankrupt act of 1841, section 3, is explicit to this effect. The right to the property for the conversion of which this action was brought, and which was never out of the custody of Preston, if the defendant Francis had no right to it, might be sold by the assignee, under the order of the court obtained for that purpose; and it appears that the assignee had authority to sell, and did sell, whatever right he had to it, to the plaintiff." Burton *v.* Lockert, 4 Eng. 411.

(*k*) Hillary *v.* Morris, 5 C. & P. 6; Valpy *v.* Oakeley, 16 Q. B. 941, 6 Eng. L. & Eq. 168; Ward *v.* Jenkins, 10 Met. 583; Lombard Bank *v.* Thorp, 6 Cowen, 46; Alivon *v.* Furnival, 4 Tyrw. 751, 1 Cromp., M. & R. 277; Carnegie *v.* Morrison, 2 Met. 381; Gibson *v.* Carruthers, 8 M. & W. 321; Akhurst *v.* Jackson, 1 Swanst. 85; Boorman *v.* Nash, 9 B. & C. 145; Goodwin *v.* Lightbody, Daniell, 153. See also, Coles *v.* Trecothick, 9 Ves. 234; *Ex parte* Peake, 1 Madd. 346; Jackson *v.* Lever, 3 Bro. C. C. 605; Mortimer *v.* Capper, 1 id. 156; Gray *v.* Bennett, 3

all those which come to him by devise or inheritance. (*l*) And if these rights are only inchoate, and require some act on the part of the insolvent to make them complete, the assignee may in general do that act, or the court of equity will compel the insolvent to do it. (*m*)

Some question has arisen where a devise falls to the insolvent after the proceedings commence, but before he obtains his discharge. It is certainly true that a devise is not effectual to pass the property to the devisee, without his consent and acceptance, any more than a gift can vest in the donee without his consent and acceptance. If, then, the bankrupt refused to accept, the devise might pass to the heir of the devisor, perhaps by a corrupt bargain with the bankrupt, and the creditors be defrauded. To guard against this mischief, it is held, that if the devise be absolute, and without charge or incumbrance, and plainly for his benefit, the law will presume his acceptance, and the assignees take his title. (*n*) And we think the princi-

Met. 522; Sharke *v.* Roahde, 2 Rose, 192; Brooke *v.* Hewitt, 3 Ves. 253; Willingham *v.* Joyce, id. 168. If a contract for a lease has been made, merely for the *personal accommodation of the bankrupt*, the assignees are not entitled to specific performance. Flood *v.* Findlay, 2 Ball & B. 9.

(*l*) Tudway *v.* Bourn, 2 Burr. 716; Toulson *v.* Grout, 2 Vern. 432; *Ex parte* Ansell, 19 Ves. 208; Ranking *v.* Barnard, 5 Madd. 32; *Ex parte* O'Ferrall, 1 Glyn & J. 347; Cherry *v.* Boultbee, 4 Mylne & C. 442; *Ex parte* Man, Mont. & McA. 210; *Ex parte* Makins, Mont., D. & De G. 613; Brandon *v.* Robinson, 1 Rose, 197.

(*m*) This point will be found considered in the cases above cited in note (*a*), p. 469, with reference to indorsement, and the rights of the assignees in the contracts of the bankrupts.

(*n*) If a devise falls after the petition and before decree, this will pass to the assignees of the bankrupt. In *Ex parte* Newhall, 2 Story, 360, *Story*, J., said: "The third section of the bankrupt act of 1841, chap. 9, declares, that all property and rights of property of every bankrupt who shall, by the decree of the proper court, be declared a bankrupt within the act, shall, by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of the bankrupt; and the same shall be vested, by force of the same decree, in such assignee as, from time to time, shall be appointed by the proper court for this purpose. It seems to me that the natural, and even necessary, interpretation of this clause is, that all the property and rights of property of the bankrupt, at the time of the decree, are intended to be passed to the assignee. It is true that the decree will, by relation, cover all the property which he had at the time of filing the petition, and at all intermediate times, to effect the manifest purpose of the act. But this is rather a conclusion, deducible from the general provisions and objects of the whole act, than a positive provision. It results, by necessary implication, in order to effect the obvious purposes of the act, and to prevent what otherwise would or might be irremediable mischief. . . . I take the plain distinction, running through the act, to be, that it is not intended to touch any property or rights of property which may be acquired by a descent to him, after the decree in bankruptcy, by which he has been decreed to be a bankrupt, but that it covers all his property, acquired by or descended to him or belonging to him before the decree. The

ple would be applied, even if there were charges or conditions to the devise, but, upon the whole, it would certainly be beneficial; and of course the assignees would take the devise *cum onere*. (*o*)

If the interests are vested in the insolvent, the assignee takes them, although they are not in his possession, as a remainder or reversion. So if it rest on a contingency, the assignee takes subject to the contingency, or rather takes the right to recover if the contingency happens. (*p*)

By this is meant, however, a legal contingency, and not a mere possibility, without some vested legal interest. Thus, any

English statutes of bankruptcy go further, and vest in the assignee all the property of the bankrupt which comes to him by descent, distribution, or otherwise, before the discharge is granted. But this doctrine stands only upon the positive language of those statutes, and not upon any general principles of law applicable to the subject." *Ex parte* Fuller, 2 Story, 327; Townsend *v.* Tickell, 3 B. & Ald. 31; Doe *v.* Smyth, 6 B. & C. 112; Brown *v.* Wood, 17 Mass. 68; Ward *v.* Fuller, 15 Pick. 185. See next note.

(*o*) In the case of *Ex parte* Newhall, cited in the last note, the facts were, that after the filing of the petition, and before the decree in bankruptcy, the bankrupt became entitled to certain property as heir to his mother, to whom, when alive, he had been indebted. Judge *Story* held, that the assignee of the bankrupt was only entitled to the bankrupt's moiety, or distributive share, after deducting therefrom his debt to the estate. See the cases cited in note (*v*), § 6, *ante*, p. 468.

(*p*) The test seems to be a clear one and easy of application. It is this: an interest (as has already been stated), which can be assigned or transmitted by the bankrupt himself, will pass to the assignee. The leading case on this subject is Higden *v.* Williamson, 3 P. Wms. 132. In this case, one seized of a copyhold estate, surrendered the premises to the use of his last will, and afterwards devised them to his daughter for life, then to trustees to be sold, and the money arising from the sale to be divided among such of his daughter's children as should be living at her death. Testator died; the daughter had issue, among others a son, who was a trader, and became bankrupt, and the commissioners assigned his estate. The bankrupt got his certificate allowed, and then his mother died. The assignees brought their bill for the bankrupt's share of the money arising from the sale. The case of Jacobson *v.* Williams, 1 P. Wms. 385, having been relied on by counsel, Sir *J. Jekyll*, M. R., decreed for the plaintiffs, distinguishing the principal case from that of Jacobson *v.* Williams, for there the husband, the bankrupt, could not have come at his wife's portion by the aid of equity without making some provisions for her, and it was not reasonable the assignees, who stood but in his place, and derived their claim from him, should be more favored. Also the Master said he laid his finger and chiefly grounded his opinion on the words of the statute 13 Eliz. chap. 7, sect. 2, which enacts "that the commissioners shall be empowered to assign over all, that the bankrupts might depart withal." Now here the son might, in his mother's lifetime, have released his contingent interest, so that the commissioners, by virtue of that act, are enabled to assign it, and consequently these assignees must be well entitled. The same test was admitted by Lord *Hardwicke*, in Jewson *v.* Moulson, 2 Atk. 417, though differing on the question, whether the possibility in Heyden *v.* Williams, was not of this class, which might be assigned at least in equity. Taylor *v.* Wheeler, 2 Vern. 565; *Ex parte* Goldney, 3 Deacon, 570; *Ex parte* Foster, 1 Mont., D. & De G. 418; Foster *v.* Hudson (on appeal), 2 id. 177; Moth *v.* Frome, Ambl. 394; Carleton *v.* Leighton, 3 Meriv. 667; French *v.* Carr, 2 Gilman, 664; Dommett *v.* Bedford, 6 T. R. 684, Loftt, 71; Perry *v.* Jones, 1 H. Bl. 30, in error, 3 T. R. 88.

beneficial contingency, however distant or improbable in fact, if it be actually vested, will go to the assignee; but if the insolvent be the only son of a father who is aged, single, wealthy, diseased, or even incurably insane, so that his enjoying the inheritance seems placed beyond any question, if it does not in fact fall to him by the death of his father, before he obtains his discharge, it belongs to him, and the assignees have no claim whatever. Equities of redemption are among those real interests which most frequently pass to the assignee. For it generally happens that a bankrupt has already endeavored to extricate or save himself by raising what money he could by mortgages on whatever property which he could use for that purpose. We have already said that the assignees may, in general, redeem all mortgages; (q) or they may sell the equities; this last is the most usual way; but if there is any question whatever, the order or permission of the proper court should be obtained.

An interesting question has arisen as to the effect of a want of record. Wherever this record is required when land is transferred, as is the case in all our States, it is obvious that no mortgage which is unrecorded can be made available for the mortgagee or his assigns or representatives, against one who purchases the land in good faith, without notice. But in England, where there is no general law of record, there is a strong disposition to hold a purchaser, by copyhold, for example, where there has been no surrender, and the legal title is incomplete, as a purchaser by contract, and therefore holding by good title against the assignees. (r) In this country, however, it seems to be settled by the highest authority, that the requirement of record is peremptory, and not to be set aside. (s) And an assignee would hold where the insolvent had made a mortgage which was not recorded; and would not hold where a mortgage was made to him, and he had not recorded it, and a party claims to

(q) See *supra*, p. 468, and cases cited.

(r) Deacon on Bankruptcy, tit. Copyhold, 354; Taylor *v.* Wheeler, 2 Vern. 565. See also, *Ex parte* Harvey, Buck, 493; *Ex parte* Holland, 4 Madd. 483; Doe *v.* Clark, 1 Dow. & R. 44, 5 B. & Ald. 458.

(s) 4 Kent, Com. 168, and notes.

hold it by subsequent transfer from the mortgagor, for value and without notice.

We do not know in this country, or scarcely know, the equitable mortgage of the English law, which is created by a mere delivery of the title deeds. (*t*) Still, we have equitable mortgages, or rights or liens to which a court of equity would give such an effect. And the court would probably enforce such a mortgage, at the suit of the assignee, or for his benefit, if no positive law made a record necessary.

If the insolvent can maintain a writ of entry, or any action for land, or for the rents and profits of the land, the assignees take all the rights. (*u*)

So, if the insolvent's wife has land, and the insolvent has any estate or interest in it as her husband, for her life, or as tenant by the curtesy for his own, all this interest of the husband passes to the assignee. (*v*) And it passes so absolutely, that it seems no suit can be brought against the husband after the act of bankruptcy, for division, or for any purpose, and no such action can be defended against by the bankrupt himself, or in his own name, but only by the assignee. (*w*)

In regard to the real estate, as well as to the personal estate

(*t*) Berry *v.* Mutual Ins. Co. 2 Johns. Ch. 603; Portwood *v.* Outton, 3 B. Mon. 247; Rockwell *v.* Hobby, 2 Sandf. Ch. 9; Williams *v.* Stratton, 10 Smedes & M. 418; Welsh *v.* Usher, 2 Hill, Eq. 170. See also, Shitz *v.* Dieffenbach, 3 Penn. St. 233; Vanmeter *v.* McFaddin, 8 B. Mon. 435; Adams's Equity (Am. ed.), 333.

(*u*) Smith *v.* Coffin, 2 H. Bl. 444; Mitchell *v.* Hughes, 4 Moore & P. 577, 6 Bing. 689. The case of Smith *v.* Coffin was a writ of entry *sur abatement*, brought by the assignees of a bankrupt. *Eyre*, L. C. J., said: "This case has been very elaborately and ably argued by my brother *Williams*, but his argument goes against the most express and plain spirit of the bankrupt laws, which is, that every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors. . . . It is true, that on general principles, rights of action are not forfeitable nor assignable, except in a particular mode; but that rule is founded on the policy of the common law, which is averse to encourage litigation; but in this case the policy of the bankrupt laws requires that the right of action should be assignable and transferred to the assignees as much as any other species of property. It is an hereditament, and the words of the statute are large enough to comprehend it; and no case has been shown to prove that it ought not to pass. What, then, does the whole argument amount to but this — that in many cases, from the policy of the law, a right of action does not pass. But here the policy is, that every right, belonging in any shape to the bankrupt, should pass to his assignees. And this being the clear intent of the law, a particular recital of this species of right could not be necessary. I think it is a clear case, both on the words of the act of parliament, and on the subject-matter." See also, cases cited *ante*, note.

(*v*) Jacobson *v.* Williams, 1 P. Wms. 383. See further cases cited *ante*, note (*a*), sect. 6, p. 469.

(*w*) Mitchell *v.* Hughes, 6 Bing. 689. *Tindal*, C. J.: "Upon the general ground therefore, that in all instances in which

of the insolvent, it may be regarded as a very general, if not a universal rule, that whatever the insolvent could himself transfer to his creditors or to his assignees for them, the law itself, without his act, transfers to his assignees. (*x*)

It is an apparent exception, and not a real one, which will not permit an assignee to take what the insolvent holds in trust, or in any fiduciary relation. For the insolvent could not transfer that in payment of his own debts, honestly or legally. But it may be sometimes difficult to distinguish between such fiduciary interest, which the assignee would not take, and an interest encumbered with a charge, which he would take. In general, it may be said, that if the thing to be done be capable of immediate performance, and the assignee can do it as well as the insolvent, and by doing it a valuable interest will become vested in the assignee, which he can use for the benefit of the creditors, without detriment to any person, such an interest or right the assignee will take.

SECTION VIII.

WHAT PERSONAL PROPERTY INSOLVENCY TRANSFERS TO THE ASSIGNEE.

Some of the principles already stated as to real property, apply equally to personal property. (*y*) Thus, the assignee takes

the assignees take any thing derivatively from the bankrupt, they are empowered by the bankrupt act to sue in their own names. We think the present court, in which the bankrupt sues to recover, in his own name and that of his wife, land in which he would take a freehold, that would forthwith belong to the assignees, cannot be supported."

(*x*) See cases cited *ante*, note (*q*), p. 472.

(*y*) We collect in this note a few of the more instructive cases, in regard to the transfer of personal property in possession, in addition to those cited in the preceding section: Jewett *v.* Preston, 27 Maine, 400; Griswold *v.* Pratt, 9 Met. 16, cited *aliter* to another point; Cary *v.* Crisp, 1 Salk. 108; Billon *v.* Hyde, 1 Ves. Sen. 328. In this case Lord Hardwicke said: "By the act of bankruptcy, all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed, and that may go back to a great length of time; and it overcharges all those acts, without regard to the fairness or fraud in them, so that a sale of goods by the bankrupt after the act committed, is a sale of their property, and for which they may maintain trover." In Cooper *v.* Chitty, 1 Burr. 31, Lord *Mansfield* said: "This relation the statutes of bankruptcy introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what

no chattels or choses in action held by the insolvent only in a fiduciary capacity; but if any be held by him partly for the benefit of others and partly for his own benefit, his own personal interest, if it be severable, would pass to the assignee. (z) So, all the contracts of the assignee which relate to personalty, may be assumed and executed by the assignee for the benefit of the fund, unless the services to be rendered, or the work to be done, could be only performed by the insolvent individually, and not by any other person in his stead. (a)

I may call the crime committed (for the old statutes consider him a criminal); they make a sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy." Kitchin *v.* Campbell, 3 Wilson, 304; Lazarus *v.* Waithman, 5 J. B. Moore, 313; Balme *v.* Hutton, 9 Bing. 471; Rouch *v.* The Great Western Railway Co. 1 Q. B. 51; Winks *v.* Hassall, 9 B. & C. 372; Kynaston *v.* Crouch, 14 M. & W. 266; Pearson *v.* Graham, 6 A. & E. 899; Harwood *v.* Bartlett, 6 Bing. N. C. 61; Stephens *v.* Elwall, 4 M. & S. 259; Coles *v.* Wright, 4 Taunt. 198; Tope *v.* Hockin, 7 B. & C. 110; Ward *v.* Dalton, 7 C. B. 643; Acraman *v.* Morrice, 8 id. 449; Tooke *v.* Hollingworth, 5 T. R. 215; Valpy *v.* Sandars, 5 C. B. 886; Wilkins *v.* Bromhead, 6 Man. & G. 963; Carvalho *v.* Burn, 4 B. & Ad. 382; Dangerfield *v.* Thomas, 9 A. & E. 292; Anderson *v.* Miller, 7 Smedes & M. 486; *Ex parte* Cotterill, 3 Mont. & A. 376; Belcher *v.* Campbell, 8 Q. B. 1.

(z) Carpenter *v.* Marnell, 3 B. & P. 40; Copeman *v.* Gallant, 1 P. Wms. 314; *Ex parte* Gillett, *Ex parte* Bacon, 3 Madd. 28; Joy *v.* Campbell, 1 Sch. & L. 328; Winch *v*, Keeley, 1 T. R. 619; *Ex parte* Martin, 19 Ves. 491; Gardner *v.* Rowe, 2 Simons & S. 346; *Ex parte* Chion, 3 P. Wms. 187, n. (*a*); Walker *v.* Burnell, Doug. 317; Collins *v.* Forbes, 3 T. R. 316.

(*a*) Whitworth *v.* Davis, 1 Ves. & B. 545; Sloper *v.* Fish, 2 id. 145; Sharpe *v.* Roahde, 2 Rose, 192; Goodwin *v.* Lightbody, 1 Daniell, 153; Butler *v.* Carver, 2 Stark. 433; Brooke *v.* Hewitt, 3 Ves. 253; Weatherall *v.* Geering, 12 id. 513; Smith *v.* Coffin, 2 H. Bl. 444; Moyses *v.* Little, 2 Vern. 194; Drake *v.* Mayor of Exeter, 1 Ch. Ca. 71, 1 Eq. Ca. Abr. 53; Valpy *v.* Oakeley, 16 Q. B. 941, 6 Eng. L. & Eq. 168; Alder *v.* Keighley, 15 M. & W. 117; Hill *v.* Smith, 12 id. 618; Gibson *v.* Carruthers, 8 id. 321; Boorman *v.* Nash, 9 B. & C. 145; Splidt *v.* Bowles, 10 East, 279; Kymer *v.* Larkin, 5 Bing. 74; Akhurst *v.* Jackson, 1 Swanst. 85; Flood *v.* Finlay, 2 Ball & B. 9; *Ex parte* Goodall, 2 Glyn & J. 281. And see other cases cited *ante*, sect. 6, n. (*p*), p. 465. Other interests of a character somewhat uncertain will pass to the assignee. Thus, in the case of a patent right, it was held that this would pass. Hesse *v.* Stevenson, 3 B. & P. 565. Lord *Alvanley*, C. J., said: "It is contended that the nature of the property in this patent was such that it did not pass under the assignment; and several cases were cited in support of this proposition. It is said, that although, by the assignment, every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignees, yet that the fruits of a man's own invention do not pass. It is true that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass, nor could the assignees require him to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. Can there be any doubt that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees

This is true, even if the contract forbid assignment, and make it void. Thus, fire policies generally, and marine policies often, prohibit assignment, and the insured might lose any benefit under them by a voluntary assignment. But in bankruptcy and insolvency, although the word "assignee" is used, it is inaccurate, as the property is transferred by the law, and not by the owner, who is the only party who can assign. (*b*) For, as we have seen, the process of transfer to the assignee is rather one of sequestration; the law taking the property or interest from the insolvent, and then placing it in the hands of the assignee as trustee. But courts have gone still further. In one case, at least, the insurance was held not to be forfeited by a voluntary assignment by the insured to assignees in trust for creditors. (*c*) The true ground for such a doctrine would seem to be, that the assignment left the property insured, and the interest in the policy substantially belonging to the owner, and applicable only to payment of his debts, with the right to any surplus which might remain; so that the assignee is only acting as the agent of the insolvent. This doctrine is generally acquiesced in, and all voluntary assignments for creditors do, we believe, transfer the insured property and the policies; but still it is customary and safer to obtain the consent of the insurers.

The assignee takes all personal property abroad, under the qualification imposed by the American rule, as stated above; that is, he acquires no right which can avail against an attachment or levy made in the State where it is situated, in favor of a citizen of that State, before the assignee takes actual possession. (*d*)

may claim it? They cannot indeed take the profits of his daily labor. He must live. But if he accumulates any large sum, it cannot be denied that the assignees are at liberty to demand it; though, until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property, by setting up his bankruptcy. We are, therefore, clearly of opinion, that the interest in the letters patent was an interest of such a nature as to be the subject of assigment by the commissioners." So an interest in a policy of insurance. Schondler *v.* Wace, 1 Camp. 487, and *infra*. So an interest in improvements made by the bankrupt upon a tract of government land. French *v.* Carr, 2 Gilman, 664.

(*b*) Lazarus *v.* Commonwealth Ins. Co. 5 Pick, 76, 19 id. 81.

(*c*) 1 Phillips on Insurance, 73, 74; Brichta *v.* N. Y. La Fayette Ins. Co. 2 Hall, 372.

(*d*) See the cases cited on the subject of the transfer of goods by foreign assignment in bankruptcy, and especially to this point, Blake *v.* Williams, 6 Pick. 286; 2

As to the wife's choses in action, it seems now to be settled, after a considerable conflict and uncertainty, that the assignee takes the husband's right of reducing them to possession, and collecting and holding the proceeds for the benefit of the creditors. It would seem, therefore, that an endeavor by the husband to put his wife's unreduced choses in action out of the reach of his creditors, and to secure them for her by trustees or otherwise, would be as ineffectual as an effort to appropriate a part of his money for the same purpose. Whether insolvency operates a reduction to possession, or only transfers to the assignee the right to reduce, has been much disputed. But the better reason and the better authority favor the view, that it gives only a right to reduce; and, therefore, the assignee has no property in the thing until actually reduced. (*e*)

Kent, 406, *et seq.*; Burk *v.* M'Clain, 1 Harris & McH. 236; Milne *v.* Moreton, 6 Binn. 353; Abraham *v.* Plestoro, 3 Wend. 538; Merrick's case, 2 Ashm. 485; Johnson *v.* Hunt, 23 Wend. 90, 91; Lord *v.* Brig Watchman, Ware, 232; Fall River Iron Works *v.* Croade, 15 Pick. 11; Fox *v.* Adams, 5 Greenl. 245; Saunders *v.* Williams, 5 N. H. 213; Ogden *v.* Saunders, 12 Wheat. 213; Agnew *v.* Platt, 15 Pick. 417.

(*e*) The doctrine of the law upon this subject, was well set forth by *Shaw*, C. J., delivering the opinion of the court in Davis *v.* Newton, 6 Met. 537: "The other material question is, whether the assignee had a right, and whether, in the proper discharge of his duty as assignee, he ought to have asserted his right to the notes and securities which are claimed as the choses in action of the wife of the insolvent. It is undoubtedly the policy and the legal effect of the insolvent laws, to transfer to the assignees, for the benefit of creditors, all the property of the debtor, and all the rights and interests which he could properly transfer by his own act; and the extent of this assignment is very broad and comprehensive. And the English bankrupt laws, which are nearly in the same terms, recognize the right of the assignee to possess himself of the choses in action, and other property of the bankrupt's wife. For the purpose of the law is to transfer the rights of the debtor, in the same plight which they were in, in the hands of the debtor himself, subject in all respects to the same liens, incumbrances, and equities. But it seems to be a well-settled rule, that the property of the husband in the rights and choses in action of the wife is not absolute and unlimited. Gassett *v.* Grout, 4 Met. 486. The husband may reduce the wife's choses in action to possession, and assign the same to his creditors; but ordinarily he is not compellable to do so, and if he does it, and they require the aid of a court of justice, it will not be granted unless a reasonable provision be made out of it for the wife." Gray *v.* Bennett, 3 Met. 522; Mitford *v.* Mitford, 9 Ves. 87; Jewson *v.* Moulson, 2 Atk. 420; Gayner *v.* Wilkinson, Dickens, 491; Saddington *v.* Kinsman, 1 Bro. C. C. 44; Van Epps *v.* Van Deusen, 4 Paige, 64; Pierce *v.* Thornely, 2 Simons, 167; Christian on the Bankrupt Law, 270; Hornsby *v.* Lee, 2 Madd. 16; Wooland *v.* Crowther, 12 Ves. 174; Nash *v.* Nash, 2 Madd. 133; 2 Story, Eq. Jur. ch. 37, § 1411 *et seq.*; 1 Fonbl. Eq. B. 1, ch. 4, § 24; Forrest *v.* Warrington, 2 Desaus. 254; Thomas *v.* Kelsoe, 7 T. B. Mon. 523; Ripley *v.* Wood, 2 Simons, 165; *Ex parte* Beresford, 1 Desaus. 268; Forbes *v.* Phipps, 1 Eden, 502; Gallego *v.* Gallego, 2 Brock, 285; Ryland *v.* Smith, 1 Mylne & C. 53; Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Outcalt *v.* Van Winkle, id. 516; Oglander *v.* Boston, 1 Vern. 396; Milner *v.* Milnes, 3 T. R. 627; Parsons *v.* Parsons, 9 N. H. 309; Hayward *v.* Hayward, 20 Pick. 517; Page *v.* Estes, 19 id. 269;

All the money in the insolvent's hands, or in deposit at any bank or elsewhere for him, or in the hands of any agent or attorney, passes at once to the assignee, and his order or check for it, after notice as assignee, is valid, and the insolvent's check is not valid. (*f*)

Holbrook *v.* Waters, id. 354; Wheeler *v.* Bowen, 20 id. 563. See the remarks of *Shaw*, C. J., in Davis *v.* Newton, 6 Met. 537, defining the extent of the doctrine of the last two cases. Miles *v.* Williams, 1 P. Wms. 249; Bosvil *v.* Brander, id. 458; Mitchell *v.* Hughes, 6 Bing. 689. On the conflict of opinion in the earlier and later English cases, as to the effect of assignment, see the note to p. 119 of the second volume of Kent's Commentaries, 8th ed., and the following additional cases; Chandos *v.* Talbot, 2 P. Wms. 601; Hawkyns *v.* Obyn, 2 Atk. 549; Bates *v.* Dandy, id. 207; Hornsby *v.* Lee, above cited; Purdew *v.* Jackson, 1 Russell, 70; Honner *v.* Morton 3 id. 65; Wright *v.* Morley, 11 Ves. 12; Ellison *v.* Elwin, 13 Simons, 309; Elliott *v.* Cordell, 5 Madd. 149; Stanton *v.* Hall, 2 Russ. & M. 175; Tidd *v.* Lister, 10 Hare, 140, 17 Eng. L. & Eq. 567; Shaw *v.* Mitchell, 5 Law Reporter, 453. The right in equity of the wife to a provision out of her choses in action, when the assignee asks the aid of equity to aid him in enforcing his remedies, seems clearly settled at this day. In addition to the cases above cited, the doctrine will be found elaborately and clearly set forth in 2 Kent's Commentaries, pp. 121, *et seq.*, where numerous authorities on the point are examined.

(*f*) This seems necessarily to follow from the cases already cited, showing that *all the property* of the bankrupt is, by the decree in bankruptcy, transferred to the assignees. Hill *v.* Smith, 12 M. & W. 618. In all such cases, the simple test question would seem to be, "Can the money in whosesoever hands it may be, be clearly recognized as the bankrupt's?" Godfrey *v.* Furzo, 3 P. Wms. 185; *Ex parte* Rowton, 17 Ves. 426; *Ex parte* Sollers, 18 id. 229. In Scott *v.* Surman, Willes, 400, it was held, that if goods be consigned to a factor for sale, and he sell and receive the money before his bankruptcy, and do not purchase with it any specific thing, capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from the assignees, but must come in under the commission. But that if the goods remain in specie in the factor's hands at the time of the bankruptcy, the consignors may recover the goods in trover from the assignees. Or if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received. The court, with regard to the particular facts before them, held, that the money which had been received by the factor in payment for goods sold, could not be recovered in full, because here it could not be distinguished from other money of the bankrupt factor. Money has no earmark, and therefore cannot be followed. *Willes*, C. J., in this case. But in the modern practice of factors, where money is deposited to the particular account of each consignor, it is conceived that such money may well be held to possess an earmark. And to the same point are Burdett *v.* Willett, 2 Vern. 638; Tooke *v.* Hollingworth, 5 T. R. 215. Lord *Kenyon*, C. J.; "If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the rest of his property the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt. Nay, if the goods be sold, and reduced to money, provided that money be in separate bags, and distinguishable from the factor's other property, the law is the same." Hall *v.* Boardman, 14 N. H. 38; Price *v.* Ralston, 2 Dall. 60; Taylor *v.* Plumer, 3 M. & S. 562; Denston *v.* Perkins, 2 Pick. 86; Chesterfield Manuf. Co. *v.* Dehon, 5 id. 7; Scrimshire *v.* Alderton, 2 Stra. 1182. So in the case of an executor, — Howard *v.* Jemmett, 3 Burr. 1369, note. Lord *Mansfield* said: If an executor becomes bankrupt, the commissioners cannot seize the *specific* effects of his testator, not even in *money* which *specifically can be distinguished and ascertained* to belong to such testator, and not to the bankrupt himself. *Ex parte* Chion, cited *supra*. And where the bankrupt's wife is an executrix, the property shall be preserved entire to the testator's representatives. Viner *v.* Cadell, 3 Esp. 88.

So the assignee claims all debts; and if there be mutual accounts or claims between the insolvent and another, the assignee takes only the balance due the insolvent, with full right of set-off in the creditor. (*g*) If the other party has a right as against the insolvent to retain the whole and settle the whole account, until a final balance is struck, he would have the same right as against the assignee. Thus, if a member of a partnership became insolvent, his interest in the property of the firm would pass to his assignee, subject to the rights of the other partners, much as it would by attachment or levy, as has been described in our chapter on partnership. (*h*)

(*g*) It is an error to suppose, as has sometimes been supposed, that the right of set-off, or the law of mutual credits in bankruptcy, originated in statute provisions. It had been adopted by the courts of law, without any legislative interference. They permitted a creditor to set off his debts against the bankrupt debtor, and pay over to the assignees, or prove for the balance, as the adjustment of accounts might require. Anonymous, 1 Mod. 215; Chapman *v.* Derby, 2 Vern. 117; 1 Christ. Bankrupt Law, 279–499; 1 Gooding, Bankrupt Law, 190; and later cases cited below, recognize this right as existing at the common law. The first English statute which alluded to this right was the 4 and 5 Anne, c. 17. The operation of this statute was continued by 7 Anne, c. 25, § 4. This last statute was reënacted by 5 Geo. 1, c. 24, which was restricted in point of time, and after its expiration still more effectual provision was made on the subject of mutual debts and credits, in that of 5 Geo. 2, c. 30. Further provision was added in 46 Geo. 3, and these statutes form the basis of the English statutes of the present day, relating to this matter. From the English, this doctrine has been introduced into the American bankrupt law. The cases on this subject are very numerous. Many of them will be found collected and examined in 1 Deacon on the Law of Bankruptcy, 698, *et seq.* We cite those cases which seem most clearly to set forth the doctrine. The opinion of *Tindal*, C. J., in Gibson *v.* Bell, 1 Bing. N. C. 743. In *Ex parte* Deeze, 1 Atk. 228, Lord *Hardwicke* said: "Notwithstanding the rules of law as to bankrupts reduce all creditors to an equality, yet it is hard when a man has a debt due from a bankrupt, and has at the same time goods of the bankrupt in his hands, which cannot be got from him without the assistance of law or equity, that the assignee should take them from him without satisfying the whole debt, and therefore the claim in the statute relating to mutual credit has received a very liberal construction; and then there have been many cases, which that clause has been extended to, where an action of account would not lie, nor could the Court of Chancery upon a bill decree on account." Murray *v.* Riggs, 15 Johns. 571; Bize *v.* Dickason, 1 T. R. 285; Smith *v.* Hodson, 4 id. 211; Tucker *v.* Oxley, 5 Cranch, 34; *Ex parte* Prescot, 1 Atk. 230; Brown *v.* Cuming, 2 Caines, 33, and reporter's note; Bigelow *v.* Folger, 2 Met. 255; Bolland *v.* Nash, 8 B. & C. 105; Boyd *v.* Mangles, 16 M. & W. 337; Marks *v.* Barker, 1 Wash. C. C. 178; Demmon *v.* Boylston Bank, 5 Cush. 194, and cases cited; Sarratt *v.* Austin, 4 Taunt. 199; Humphries *v.* Blight's assignees, 4 Dall. 370; Bemis *v.* Smith, 10 Met. 194; Hewison *v.* Guthrie, 3 Scott, 298; Russell *v.* Bell, 1 Dowl. N. S. 107; Hulme *v.* Muggleston, 3 M. & W. 30; Young *v.* Bank of Bengal, 1 Deacon, 622; Rose *v.* Hart, 8 Taunt. 499. See the learned note on this case, 2 Smith's L. C. 172, wherein the cases upon this point are collected and discussed; Rose *v.* Sims, 1 B. & Ad. 521; Abbott *v.* Hicks, 7 Scott, 715; Groom *v.* West, 8 A. & E. 758; Tamplin *v.* Diggins, 2 Camp. 312; Ridout *v.* Brough, Cowp. 133. The debts must be due in the same right; Forster *v.* Wilson, 12 M. & W. 191; *Ex parte* Blagden, 2 Rose, 249; Yates *v.* Sherrington, 11 M. & W. 42, 12 id. 855; Belcher *v.* Lloyd, 10 Bing. 310.

(*h*) Note (*z*), sect. 14 of the chapter on Partnership; note (*v*), p. 468, sect. 6, of

In one respect an assignee acquires rights which an insolvent himself does not possess. For if the insolvent has fraudulently conveyed any property, real or personal, although he would not be able to defeat the operation of his own fraud and recover the property for his own benefit, the assignee may certainly do that for the benefit of the creditors. (*i*) Difficult

the present chapter, that all liens and equities which would avail against the bankrupt will be good against his assignees. In Collyer on Partnership (Perkins' ed.), § 111 and *passim;* Gow on Partnership, ch. 5, § 3, p. 256–348, 3d ed.; Watson on Partnership, ch. 5, p. 243–356, 2d ed.; 1 Montagu on Partn. B. 2, ch. 7, p. 226–233, Am. ed.; Cooke on Bankrupt Law; Christian on Bankruptcy; Deacon on Bankruptcy; Montagu & Ayrton on Bankrupcy. Under the head of Partnership, the right of partners in case of insolvency of one of their number is fully discussed. The general doctrine on this subject is set forth by Lord Chief Justice *Eyre,* delivering the opinion of the court in Bolton *v.* Puller, 1 B. & P. 539: "Bankruptcy, when it intervenes, may very much change the situation of these parties. Mr. Justice *Heath* suggested this consideration at the close of the first argument. It is a very important consideration. If all become bankrupts, all the joint and all the separate property will vest in the assignees, whether the commissions are joint or several. If a separate commission issue against one partner, his assignees will take all his separate property, and all his interest in the joint property. If a joint commission issues against all, the assignees will take all the joint property and all the separate property of each individual partner. In the distribution to creditors, a rule of convenience has been adopted. To understand it, we should see what the rights of creditors were as to execution for their debts before bankruptcy. A separate creditor might take at his election the separate estate of his debtor, or his debtor's share of the joint estate, or both, if necessary. A joint creditor might take the whole joint estate, or the whole separate estate of any one partner. But the rule of convenience which has been adopted, restrains the separate creditor from resorting in the first instance to his debtor's share of the joint property, and also restrains a joint creditor from resorting in the first instance to the separate property of his debtor. Bankruptcy has been called a statute execution, but if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the Chancellor, who is to take order for the distribution of the effects of a bankrupt. Under the rule, the separate creditors have a right to be satisfied for their debts out of the separate property, in preference to the joint creditors. But what shall be deemed separate property, or what effect the claims of third persons upon that which, as between one partner and the partnership, would be separate property, are questions which neither bankruptcy nor the rule of distributions seems to touch. The assignees stand but in the place of the bankrupt, and take the effects subject to every legal and equitable claim upon those effects."

(*i*) The rule, that the assignees take subject to all equities which attach to the claim when in the hands of the bankrupt, meets, like all other general rules, with an exception in cases of fraud. Mitchell *v.* Winslow, 2 Story, 630; Graham *v.* Chapman, 12 C. B. 85, 11 Eng. L. & Eq. 498; Newton *v.* Chantler, 7 East, 138; Butcher *v.* Easto, Doug. 295; Metcalf *v.* Scholey, 2 N. R. 462; Scott *v.* Scholey, 8 East, 467; Worsley *v.* De Mattos, 1 Burr. 467; Wilson *v.* Day, 2 id. 827; Siebert *v.* Spooner, 1 M. & W. 714; Balme *v.* Hutton, 2 Younge & J. 101; Baxter *v.* Pritchard, 3 Nev. & Man. 638; Robertson *v.* Liddell, 9 East, 487; *Ex parte* Bourne, 16 Ves. 148. The case of Stewart *v.* Moody, 1 Cromp., M. & R. 777, was an action of trover by the assignees of one Grinsdale, a bankrupt, for certain furniture and goods, the property of the bankrupt. The defendants justified under an indenture of assignment, whereby Grinsdale had assigned all his property to the defendants, in trust, to pay off a mortgage, and afterwards to discharge and pay all his just debts; it was further alleged that said Grinsdale was a trader; that he was in embarrassed circumstances at the

questions of fact, rather than of law, sometimes arise as to what is fraud in this sense. Most, if not all, of the statutes in States prohibiting preference, in different ways provide for this case; and although the language is very various, the general purpose is the same. It is, to make void any transfers, whether outright or by way of mortgage or pledge, which were intended to give any creditor an advantage over any others. The transfer must be made, therefore, when the transferrer was either insolvent, or contemplated insolvency. (*j*) A transfer is in contemplation

time he executed the assignment, and that it was fraudulently executed by the said Grinsdale. The rejoinder to the replication denied that the bankrupt executed the deed fraudulently, and with intent to defeat or delay his creditors. *Parke*, Baron, said: "It has been clearly settled, that if the necessary consequences of a man's act is to delay his creditors, he must be taken to intend it. When a man assigns all his property, and puts it into a different course of distribution from what the bankrupt laws direct, he commits an act of bankruptcy. This deed, being an assignment by Grinsdale of all his property, is, therefore, clearly an act of bankruptcy." A rule to set aside the verdict for the plaintiffs was therefore refused. Chase *v.* Goble, 2 Man. & G. 930; Hooper *v.* Smith, 1 W. Bl. 441. Lord *Mansfield* in this case said: "If a man makes over so much of his stock in trade as to disable himself from being a trader, this would be fraudulent. It would be, as I said in Compton *v.* Bedford (Hil. Vac. 2 Geo. 3), an assignment of his solvency. An assignment of all his household goods would be the same, for a man cannot go on without them." Hassel *v.* Simpson, 1 Bro. C. C. 99; Tappenden *v.* Burgess, 4 East, 230; 1 Cooke, B. L. 110 (2d ed.); Harman *v.* Fisher, Cowp. 117; Dutton *v.* Morrison, 17 Ves. 193, 1 Rose, 213; Gorham *v.* Stearns, 1 Met. 366; Fidgeon *v.* Sharpe, 5 Taunt. 539; Carr *v.* Burdiss, 1 Cromp., M. & R. 443; Newnham *v.* Stevenson, 10 C. B. 713, 3 Eng. L. & Eq. 512. In this case it was held, that the right of avoiding such fraudulent transfer was in the assignees alone, and that if they did not choose to interfere, a third party had no right to intervene, and the right of the grantee of the bankrupt might be vindicated by an action against such interfering third party. Wedge *v.* Newlyn, 4 B. & Ad. 831; Pulling *v.* Tucker, 4 B. & Ald. 382; Arnold *v.* Maynard, 2 Story, 349; Steene *v.* Aylesworth, 18 Conn. 244; Rose *v.* Haycock, 1 A. & E. 460; *Thompson*, J., in Wakeman *v.* Hoyt, 5 Law Reporter, 309; Butler *v.* Hildreth, 5 Met. 49.

(*j*) The nature of the fraud, in transfers of this character, is stated, in addition to the above cases, by Lord *Tenterden*, in Cook *v.* Caldecott, Moody & M. 525: "All other proof of any act of bankruptcy previous to the sales in question having failed, the only question is, whether the transactions in themselves, or either of them, are to be considered as acts of bankruptcy, within the 6 G. 4, c. 16, s. 3. The words of the clause are 'fraudulent gift, delivery, or transfer,' the word 'fraudulent' of course applying to each of those which follow it. Now, the sale is a 'transfer,' and therefore may come within the provisions of the statute as a 'fraudulent transfer.' But though it may do so, it is not, from its nature, a transaction exposed to the same suspicion as some of those which would be comprehended under the former words; and I think that a sale cannot in reason be held to be a fraudulent transfer, unless it takes place under such circumstances that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditors, and that the sale is made for that purpose. The question, therefore, for the jury is, whether they think that the defendant, as a man of business, ought to have known that Down must have effected these sales, or either of them, for the purpose of putting the proceeds in his own pocket, and defrauding his creditors? If so, the verdict should be for the plaintiffs, for all goods comprised in that transac-

of insolvency, as well where the insolvency exists as where it is anticipated. (*k*) So, if any transfer was made to benefit the insolvent himself illegally, it would be voidable by the assignee. And, in general, the assignee would not be barred from procuring any property of the insolvent, by his act, if it were fraudulent, or against the statute of insolvency, or the general statute of Elizabeth, or common law. (*l*)

Ships, in the port where the insolvent resides, pass to the assignee like other chattels. (*m*) If, however, they are at sea, the effect of insolvency may not be certain. We should say, however, that the general rules respecting the transfer of this property, by which an inchoate title is given by the bill of sale,

tion, or delivered subsequently to it." The meaning of the clause "in contemplation of bankruptcy," which occurs in nearly all the statutes, has been the subject of judicial discussion. In Arnold *v.* Maynard, 2 Story, 349, it was held by Judge *Story* that the clause does not necessarily mean in contemplation of his being declared a bankrupt within the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on. In this case the English authorities are reviewed, and the conclusion reached is, that if, when the party "is deeply involved in debt, and intending to fail and break up his whole business at once, he makes a conveyance to a particular creditor to give him a preference over all the rest, it seems to me irresistible evidence that he does the act in contemplation of bankruptcy. I do not think that it is necessary for this purpose that he should contemplate the conveyance as an act of bankruptcy, or that he should make it with a present and immediate intention to take the benefit of that statute. And in 8 Met. 385, Jones *v.* Howland, it was held, that though insolvency in fact exists, yet if the debtor honestly believes he shall be able to go on in his business, and with such belief pays a just debt, without design to give a preference, such payment is not fraudulent, though bankruptcy subsequently ensue." And the same doctrine was held in the District Court of Vermont, by *Prentiss*, J., 6 Law Reporter, 261. See also the language of *Gibbs*, C. J., in Fidgeon *v.* Sharpe, above cited; of *Dewey*, J., in Gorham *v.* Stearns; of Lord *Mansfield*, in Hassels *v.* Simpson, Doug. 89, in notes; and Lord *Ellenborough*, in Newton *v.* Chantler; Flook *v.* Jones, 4 Bing. 20; Poland *v.* Glyn, id. 22, n.; Ridley *v.* Gyde, 9 id. 349; Morgan *v.* Brundett, 5 B. & Ad. 289; Abbott *v.* Burbage, 2 Bing. N. C. 444; Hartshorn *v.* Slodden, 2 B. & P. 582; Gibbins *v.* Philips, 7 B. & C. 529; Atkinson *v.* Brindall, 2 Bing. N. C. 225; Belcher *v.* Prittie, 10 id. 408. But confession of a judgment is valid, in view of this provision, if it be not voluntary, but the effect of measures taken by the creditor, or in his power to take. Haldeman *v.* Michael, 6 Watts & S. 128. Though the confession be but ten days before the filing of the petition. Taylor *v.* Whitthorn, 5 Humph. 340. And security given to a creditor in contemplation of bankruptcy, with a view to prefer, is not void if the act be not strictly voluntary. Phœnix *v.* Assignees of Ingraham, 5 Johns. 412; M'Mechen's Lessee *v.* Grundy, 3 Harris & J. 185. As to the effect of a discharge obtained after such transfer, in contemplation of bankruptcy, see Brereton *v.* Hull, 1 Denio, 75; Beckman *v.* Wilson, 9 Met. 434.

(*k*) Robinson *v.* Bank of Attica, 21 N. Y. (7 Smith), 406.

(*l*) See the cases cited in the notes (*i*) and (*j*). Certain statute provisions relating to and governing this matter of fraudulent conveyances, with judicial construction thereon, will be found considered *infra*, under "Question of time."

(*m*) This would seem clearly to follow, from the cases already cited on the subject of the transfer of personal property in possession, which see.

which is completed by actual possession, without laches, would apply here. If we suppose a ship-owner transfers his ship at sea by a bill of sale, in good faith, and afterwards becomes insolvent, his assignee takes only a right to get possession of the ship, or a property in it, if he can do so, before the former transferree, and without any laches on the part of that transferree. (*n*)

Bills of lading are so far negotiable instruments, that a transfer and delivery of them in good faith, vests in the transferree the property not only in the bills, but in the property, as if by a constructive delivery. (*o*) Hence, if the bills are in the hands of the insolvent, they pass to the assignee. But if they have been transferred by him without fraud, the assignee cannot hold the goods, even if on arrival they are delivered to him, for they became, by the transfer, the property of the transferree. (*p*) So, if the bills were sent to a consignee, as factor,

(*n*) A leading case upon this subject is Mair *v.* Glennie, 4 M. & S. 240. The facts were, briefly, so far as the present subject is concerned, that one Mair, by executing a bill of sale of the ship Navigator and cargo, then at sea, and delivering it to Sharpe & Co., together with a policy of insurance upon the ship and cargo, and indorsing the bill of lading, transferred said ship and cargo to Sharpe & Co. as a security for money borrowed. Sharpe & Co. neglected, upon the ship's return and notice thereof, to take possession, or to do any act notifying the transfer of the property to them. Soon after the ship's return, Mair became bankrupt; and it was held, that the property in the ship passed to his assignees, and that by the neglect of Sharpe & Co. to take possession after the arrival of the ship, their property in her was lost. Atkinson *v.* Maling, 2 T. R. 462; Joy *v.* Sears, 9 Pick. 4; Portland Bank *v.* Stubbs, 6 Mass. 422; Lamb *v.* Durant, 12 id. 54; Brown *v.* Heathecote, 1 Atk. 160; Ryall *v.* Rolle, 1 Atk. 165; Moss *v.* Charnock, 2 East, 399; Rolleston *v.* Hibbert, 3 T. R. 406; Rolleston *v.* Smith, 4 id. 161.

(*o*) This proposition seems also necessarily to follow from the cases already cited, showing that all property and rights of property of the bankrupt pass to his assignees. And see Conard *v.* Atlantic Insurance Co. 1 Pet. 386; Lickbarrow *v.* Mason, 2 T. R. 63, 5 id. 683, 6 E. 21; Nathan *v.* Giles, 5 Taunt. 558; Turner *v.* Trustees of the Liverpool Docks, 6 Exch. 543, 6 Eng. L. & Eq. 507; Akerman *v.* Humphery, 1 C. & P. 53.

(*p*) The leading case on the subject of transfer of property by indorsement of a bill of lading, is Lickbarrow *v.* Mason, above cited. The case is an authority for saying, that after a *bonâ fide* indorsement by the vendee of goods to a third party, who has no notice of circumstances of suspicion, the title of such third party will be good, notwithstanding any such subsequent circumstances, as the insolvency of the vendee, and the assignment of his property for the benefit of his creditors. *Ashurst*, J., delivering his opinion in this case, when there had been a transfer by indorsement of the vendee, and subsequent insolvency, said: "Now in this case the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority the property is altered. And I am of opinion, that this right of the assignee could not be divested by any subsequent circumstances." In Wright *v.* Campbell, 4 Burr. 2046, Lord *Mansfield* said: "If the goods be *bonâ fide* sold by the factor at sea (as they may be when no other delivery can be given), it will be good notwithstanding the statute 21 Jac. 1, c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered, and the owner can

with a right of sale, his sale and transfer of the bills passes the property, if no notice of a previous transfer by insolvency reaches the factor or the purchaser before such transfer. And if it reached the factor, so that his sale was fraudulent, it might be doubted whether the sale would be void against an insolvent purchaser. If the bills of lading contain on their face qualifications or restrictions, these will prevail. (*q*)

If the bankrupt have sent forward any goods to buyers, whose insolvency would give the bankrupt a right to stop the goods in the transit, this right accrues to the assignee, who may exercise it in the same way and to the same extent and with the same effect, as the bankrupt himself could have done. (*r*)

never dispute with the vendee, because the goods were sold *bonâ fide* and by the owner's own authority." It has already appeared that the assignee in bankruptcy stands in the same position as his bankrupt, except in cases of fraud. See *ante*. In Conard *v.* The Atlantic Insurance Co. 1 Pet. 386–445, it is said: "By the well-settled principles of the commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsement of the bill of lading to a *bonâ fide* purchaser for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods. . . . Such an assignment not only passes the legal title as against his (the owner's) agents and factors, but also against his creditors, in favor of the assignee. *Buller*, J.'s learned opinion in Lickbarrow *v.* Mason, 6 East, 21, *n.*; Abbott on Shipping, 471. But it seems that nothing less than a *bonâ fide* sale, accompanied by transfer of the bill of lading, will so far divest the consignee's right, that his assignees in bankruptcy will take no interest in the goods. The cases above cited go no further. The question in cases of this kind must be, has the title passed? It does not pass by delivery merely of the bill of lading, without indorsement, the same being in the hands of the original consignee. Tucker *v.* Humphrey, 4 Bing. 516, 1 Moore & P. 394, *Park*, J., s. c. And the mere delivery of a shipping note of the goods, or a delivery order for them, instead of a bill of lading, will not pass the property from the vendee. Jenkyns *v.* Usborne, 7 Man. & G. 678; Townley *v.* Crump, 4 A. & E. 58; M'Ewan *v.* Smith, 2 H. L. Cas. 309; Akerman *v.* Humphery, 1 C. & P. 53. See Hollingsworth *v.* Napier, 3 Caines, 182; Walter *v.* Ross, 2 Wash. C. C. 283; Ryberg *v.* Snell, id. 403; Carter *v.* Willard, 19 Pick. 1; Suydam *v.* Clark, 2 Sandf. 133; Withers *v.* Lyss, 4 Camp. 237; Bentall *v.* Burn, 3 B. & C. 423. See Searle *v.* Keeves, 2 Esp. 598, *contra*, which must be considered overruled by subsequent cases. It has, however, been held, that when the delivery order has been lodged with *the wharfinger*, with or even without a transfer on his books, that this will operate a complete divesting of the title of the vendor, and the wharfinger holds for the purchaser's account. Harman *v.* Anderson, 2 Camp. 243; Tucker *v.* Ruston, 2 C. & P. 86. In such cases, it is clear that the interest in the goods cannot pass to the assignees in bankruptcy of the vendor.

(*q*) The cases cited in the preceding notes, and especially Turner *v.* Trustees of Liverpool Docks, 6 Exch. 543, 6 Eng. L. & Eq. 507; Akerman *v.* Humphery, 1 C. & P. 53; Jenkyns *v.* Usborne, 7 Man. & G. 675–678.

(*r*) Abbott on Shipping (Perkins' ed.), 614; Long on Sales. And see the chapter, Stoppage in Transitu, vol. 1. And, with reference to the effect of stoppage on the vendee's transferable property, it may be stated generally, that "the assignment of the commissioners does not pass any property to the assignees in goods consigned to the bankrupt which may be

Leases in England are sometimes of great value, as they run for a long time at a nominal rent. Leases of that kind exist in this country, but are much more rare. Here, in the very great majority of cases, the insolvent who holds any property as lessee, pays as much for the use of it as it is worth, and the assignee would gain nothing by taking the lease. He has, however, always the right to do this, and not unfrequently we see advertisements of the sale of such interests by assignees. But the question has even more importance here than in England, whether an assignee is bound to take a lease held by his insolvent, and what amounts to an acceptance by an assignee.

We have already considered an analogous topic, the acceptance of a devise by the assignee. (*s*) A lease differs from a devise materially, in that the lessee always pays something, which may be the full value of what he gets. The general principle, that a grantee may be presumed to accept, which certainly conforms to the fact, is far more applicable to a devise than to a lease. Moreover, an assignee is not a grantee; we have seen that even the name assignee is inaccurate. He is a trustee, for the creditors mainly, but in some respects for all parties. And if the question is answered on technical grounds, it may be said that at common law a lessee has no estate, and is not bound to rents and covenants, until entry. But on more general grounds, the assignee must be considered as acquiring by the insolvency only a *right* to take the lease; and until he makes his election, the lease either remains in the insolvent, or may be considered in abeyance. If the assignee elects not to take, the lease remains in the insolvent, with all its advantages and all its burdens, and free from all claims or right either of the assignee or of the creditors. (*t*)

stopped in transitu, whether such goods are consigned to the bankrupt himself, or whether he obtains possession of them *in their transit* to the hands of the regular consignee." Deacon on Bankruptcy, 449, where this subject is elaborately and learnedly discussed.

(*s*) See *ante*, note (*t*) to the section on Assignees, p. 467.

(*t*) In Copeland *v.* Stevens, 1 B. & Ald. 593, Lord *Ellenborough* said: "An assignment by commissioners of bankruptcy is the execution of a statutable power, given to them for a particular purpose, namely, the payment of the bankrupt's debts. Nothing passes from them, for nothing was vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. And therefore, the assignees of a bankrupt are not bound to accept a term of years that belonged to the bank-

The remark may be made generally, that whatever does not pass to the assignee, remains in the bankrupt, free from all claim. (*u*)

Assignees may take possession of leasehold property in many ways; and their possession may be implied from their words or acts. If they actually take possession, it will be presumed they do so under their title as assignees. If they demand and receive rents or profits or other advantages from the leased property, this will be deemed, generally, a taking possession. (*v*) But the mere offering the lease for sale, may be regarded as only a justifiable experiment to ascertain whether it is worth any thing,

rupt, subject to the rents and covenants, for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose; the acceptance of a term which instead of furnishing the means of such payment would diminish the fund arising from other sources, cannot be within the scope of their trust and duty. And in this respect, such a term differs from the debts of the bankrupt, and his unincumbered effects and chattels." The court, on examination, come to the further conclusion, that as to such estates the effect of the commission is suspended until acceptance. "And if the operation of the deed of assignment be suspended, his estate must necessarily remain in the bankrupt during the period of suspension, for it cannot be in abeyance and must exist in some person. And the respective situations of the bankrupt and the assignees will be similar to those of a lessor and his lessee before entry," — the assignees having what might be called an *interesse termini*. Bourdillon *v.* Dalton, 1 Peake, N. P. 238; Turner *v.* Richardson, 7 East, 335; Wheeler *v.* Bramah, 3 Camp. 340; *Ex parte* Williams, 3 Mont. & A. 210; *Ex parte* Clunes, 1 Madd. 76; *Ex parte* Banbury, 7 Jur. 660; *Ex parte* Vardy, 3 Mont., D. & D. 340; *Ex parte* Norton, id. 312.

(*u*) Smith *v.* Gordon, 6 Law Reporter, 313; Webb *v.* Fox, 7 T. R. 391; Fowler *v.* Down, 1 B. & P. 44; Turner *v.* Richardson, 7 East, 335. The case of Webb *v.* Fox was an action of trover for 300 yards of quilting. Defendants pleaded not guilty, on which issue was joined; and, secondly, the bankruptcy of the plaintiff before the time of the conversion stated in the declation, setting forth the trading, petitioning creditor's debt, bankruptcy, commission, assignment, &c. Plaintiff replied, that he became possessed of the goods after assignment, and was so possessed without molestation, &c., till defendant took the said goods, &c. Defendants rejoined, that plaintiff had not obtained his certificate. Demurrer to the rejoinder. *Ashurst*, J., said: "I take the general rule to be, that a bankrupt has a right against all persons but the assignees; here a lawful possession in him is admitted, and that is sufficient for wrongdoers." In Smith *v.* Gordon, above cited, *Ware*, J., said: "If the assignee elects not to take, the property remains in the bankrupt, and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee."

(*v*) Where the assignees took possession, they were held to have made their election, although the personal effects of the bankrupt were upon the premises, and the assignees delivered up the key immediately after the effects were sold. Hanson *v.* Stevenson, 1 B. & Ald. 303. So when the assignees took upon themselves the management and direction of the bankrupt's farm. Thomas *v.* Pemberton, 7 Taunt. 206. See also, Welch *v.* Myers, 4 Camp. 368. So also, where the assignees of a termor who had become bankrupt put up the lease for sale, and sold it, and received a deposit from the purchaser, it was held, that they had made their election and were liable to the landlord as assignees of the lease. Hastings *v.* Wilson, Holt, N. P. 290, and see the cases cited *ante*.

so that it will be for the benefit of their trust that they should take possession. (*w*) They cannot take in part, and reject in part, unless what seems to be a whole is in fact only several wholes put together, and capable of severance.

If an assignee takes a leasehold estate, he thereby becomes liable for the rent and covenants during the whole term. (*x*)

(*w*) In Turner *v.* Richardson, 7 East, 335, which may be called the leading case on this subject, the facts were, briefly, that the assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction (without stating themselves to be owners or possessed thereof); no bidder appeared; no subsequent possession was taken by the assignees. After solemn argument the court delivered their opinions *seriatim*, and *Grove*, J., said: "They were to consider whether it were for the benefit of the creditors that they should take to the property or waive it. On the one hand, if they entered and were possessed, they became liable to be sued upon the bankrupt's covenants for rent and non-repair, which might amount to more than the value of the lease; on the other hand, if the lease were valuable and they did not take to it, the creditors would have had a right to call upon them for neglect of their duty. In order, therefore, to ascertain the fact of the value, they advertised the property for sale, without stating however, that it was in their possession; it was no more than making an experiment whether the property were of any and what value, . . . it is plain, from the evidence, that finding they were of no value, they never did enter into possession; the defendants were not assenting to the assignment of these premises to them," and all the judges were agreed in this. Wheeler *v.* Bramah, 3 Camp. 340, to the same point. Mere neglect to deliver up the premises will not be held an election to take. Wheeler *v.* Bramah, above cited, Canaan *v.* Hartley, 14 Jurist, 577, or paying rent for the purpose of avoiding a distress, id. Releasing an under-tenant even, will not be deemed an election to accept. Hill *v.* Dobie, 8 Taunt. 325, 2 J. B. Moore, 342. See also, Lindsay *v.* Limbert, 12 J. B. Moore, 209; Gibson *v.* Courthorpe, 1 Dow. & R. 205; Page *v.* Godden, 2 Stark. 309; Thomas *v.* Pemberton, 7 Taunt. 206.

(*x*) This doctrine is laid down in the cases already cited. Ansell *v.* Robson, 2 Cromp. & J. 610, was an action against assignees of a bankrupt for rent; on the trial it appeared that the bankrupt was a coachmaker, and at the time of the bankruptcy had numerous coaches let on hire, under contract. The assignees entered upon the premises to keep the coaches in repair, in pursuance of the bankrupt's contracts. In August, the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to Michaelmas following. It was sought, in this action, to recover rent for the quarter ending at Christmas following. Lord *Lyndhurst* said: "If assignees go on the premises for the purpose of taking possession, and actually take possession, that is sufficient to bind them to take the premises. A tenancy from year to year, until it is terminated, is the same as a lease. The interest of the bankrupt vested in the defendants; and it was expressly found by the jury that they took possession and occupied with a view to benefit the estate; a finding perfectly consistent with the evidence." And a rule to set aside a verdict for the plaintiff was refused. If the assignees accept the lease the bankrupt is absolutely discharged from the covenants, and if he afterwards becomes assignee of his assignees, he will be under no greater liability than any other assignee. Doe *v.* Smith, 5 Taunt. 795; note to Auriol *v.* Mills, 1 Smith, L. C. 455; Boot *v.* Wilson, 8 East, 311. If on the other hand the assignees decline to accept, they cannot maintain an action on the covenants for breach thereof by the lessor. Kearsey *v.* Carstairs, 2 B. & Ad. 716; Fairburn *v.* Eastwood, 6 M. & W. 679. And it is said, that if the assignees refuse to accept the lease, it may be considered a determination of the term; and if the bankrupt lessee might, according to the terms of the lease, at the determination of the term, take the off-going crop on payment of the rent, the assignees may do the same. *Ex parte* Maundrell, 2 Madd. 315; *Ex parte* Nixon, 1 Rose, 445; and

But he may transfer the lease, and his transferree takes his place and his burden. And it has been held, that if an assignee finds an estate burdensome, and attempts to free himself by transfer to a mere beggar, the law sustains him in this; mainly on the ground that the landlord has a claim against the assignee only by privity of estate and not of contract, there being no personal confidence between them, and that as soon as the assignee parts with the estate, this claim is gone. (*y*)

If the lease contains covenants that the lessee shall not assign, and that if he does the lease shall be forfeited, it is held that the lease nevertheless passes to the assignee, and that he may transfer it. But it is also held, that the landlord may look, not only to the assignee, while he holds it, or to his transferree afterwards, but to the original lessee also; on the ground that the bankruptcy discharges or bars only the debts due at the time. (*z*) The English cases on this subject (and we have

so if the lessee was bound to leave straw, &c., the assignees must also do so. *Ex parte* Whittington, Buck, 87. *In re* Gough, Buck, 85; Broom *v.* Robinson, cited 7 East, 339.

(*y*) The case of Onslow *v.* Corrie, 2 Madd. 330, decided this precise point. The facts were, in substance, that assignees of a bankrupt, after examination, concluded to accept a lease. Subsequently, finding they had miscalculated its value, they assigned to a person who at the time of the assignment was insolvent, for the purpose of exonerating themselves from payment of rent and performance of covenants. The Vice-Chancellor, Sir *Thomas Plumer*, said: "Why is the assignee liable to the landlord? Because of the *privity of estate*. The original lessee is liable in respect of the *privity of contract*. The liability of an assignee of a lease begins and ends with his character as assignee. In him there is no personal confidence of the lessor. Ever since the case of Pitcher *v.* Tovey, it has been held, that by an assignment, an assignee exonerates himself from all claims in respect of rent, even though he assigns to a beggar. . . . . This being the general law on the subject, as to an assignment, how does the case stand upon an assignment by the assignees of a bankrupt? Such assignees are trustees for the creditors of the bankrupt. If in general an assignee of a lease is not liable to rent after an assignment, I see no ground whatever for saying assignees of a bankrupt's estate should be in a worse condition than other assignees of a lease." Valliant *v.* Dodemede, 2 Atk. 546; Pitcher *v.* Tovey, Carth. 177, 1 Salk. 81, 4 Mod. 71, 2 Vent. 228, s. c. *nom.* Tovey *v.* Pitcher, 3 Lev. 295, 1 Show. 340; Lekeux *v.* Nash, Stra. 1221; Chancellor *v.* Poole, Doug. 764; Odell *v.* Wake, 3 Camp. 394. In Philpot *v.* Hoare, 2 Atk. 219, Ambl. 480, it was held, that covenants did not bind the assignee of the lessee who had become bankrupt. Here the assignment was fradulent. Walker *v.* Reeves, Doug. 461; Buller, N. P. 159; Taylor *v.* Shum, 1 B. & P. 21; Wilkins *v.* Fry, 2 Rose, 371. The case of Knight *v.* Peachy, 1 Vent. 329, T. Raym. 303, is contra, but must be considered as overruled by subsequent cases.

(*z*) Thursby *v.* Plant, note 5, 1 Saund. 240; Barnard *v.* Godscall, Cro. Jac. 309; Brett *v.* Cumberland, id. 521; Bachelour *v.* Gage, Cro. Car. 188; Norton *v.* Acklane, id. 579; Jodderell *v.* Cowell, Cas. *temp.* Hardw. 343; Mayor *v.* Steward, 4 Burr. 2443; Cantrel *v.* Graham, Barnes' Notes, 69. Lord *Mansfield*, in Wadham *v.* Marlowe, 1 H. Bl. 437, a better report in 8 East, 311, n. Auriol *v.* Mills, 4 T. R. 94; Rowe *v.* Galliers, 2 id. 133; Boot *v.* Wilson, 8 East, 311; Valliant *v.* Dodemede, 2 Atk. 546; Doe *v.* Carter, 8 T. R.

few American ones), are not quite consistent, nor would they be altogether applicable here, as they rest in part on technicalities of the common law which would have less force with us. And a distinction has been taken there on this point between bankruptcy and insolvency. (*a*) The process against the bankrupt is *in invitum;* but the insolvent moves himself, and seeks to transfer his property. This is, therefore, a voluntary breach of a covenant not to assign, and so works a forfeiture. The proper way is to insert in every lease the proviso suggested by Lord Ellenborough, — that bankruptcy or insolvency by the lessee shall determine the lease. (*b*)

Some questions have arisen as to the rights of the assignees to or over commercial paper held by the insolvent. In general, all such paper passes to the assignee, and carries with it all the rights and interests of the insolvent. Nor does the title of the assignee depend upon the negotiable quality of the paper, for the very reason that he takes it, not by transfer or purchase, but by sequestration. (*c*) But the title and equities of third parties

57, where several additional cases, bearing on this point, are collected. Doe *v.* Bevan, 3 M. & S. 353; Tuck *v.* Fyson, 6 Bing. 321.

(*a*) See the English statutes, 49 Geo. III. c. 121, 6 Geo. IV. c. 111; Dommett *v.* Bedford, 3 Ves. 149; Wilkinson *v.* Wilkinson, Cooper, 261, 2 Wils. Ch. 57; Holyland *v.* De Mendez, 3 Meriv. 184; Doe *v.* Carter, 8 T. R. 61, s. c. id. 301; Corrie *v.* Onslow, 2 Madd. 341; Shee *v.* Hale, 13 Ves. 404, and see Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 id. 213.

(*b*) Doe *v.* Clarke, 8 East, 185; Doe *v.* Carter, above cited, where all the prior cases are collected. Cooper *v.* Wyatt, 5 Madd. 489; Rex *v.* Robinson, Wightw. 393; Brandon *v.* Robinson, 18 Ves. 434. These cases show that it is competent for a grantor, devisor, or lessor, to attach conditions to the effect that the grant, devise, or lease, shall cease on the bankruptcy of the beneficiary. But it appears that he himself will not be allowed to enter into an agreement, as by bond, for the subsequent transfer of his property for certain specified uses in the event of his bankruptcy. Thus a contingent settlement, by a trader, of his own property upon his wife, to take effect in case he should become a bankrupt, would be a limitation in fraud of creditors, and could not be allowed; but it is said, that if the wife brings a fortune to her husband, she may allow him to use it, with the proviso that in case of his bankruptcy it shall return to her. *Ex parte* Cooke, 8 Ves. 353; Higinbotham *v.* Holme, 19 Ves. 92; *Ex parte* Hinton, 14 id. 598; *Ex parte* Young, 3 Madd. 130. In the matter of Murphy, 1 Sch. & L. 49; Higginson *v.* Kelly, 1 Ball & B. 256. In the matter of Meaghan, 1 Sch. & L. 180; *Ex parte* Hodgson, 19 Ves. 207; Stavely *v.* Parsons, stated in Mr. Sumner's learned note to 8 Ves. 357.

(*c*) Wallace *v.* Hardacre, 1 Camp. 45; Hall *v.* Barnard, 1 C. & P. 382. In the case of *Ex parte* Smith, Buck's C. B. 355, no question was made that bills of exchange, like other property of the bankrupt, pass to the assignees. Here two firms, one upon the continent of Europe, and the other in London, had been in the habit of drawing upon, and transmitting bills of exchange to, one another on general account. In this instance, bills had been sent by the continental house to the London firm for the especial purpose of raising money thereon for the account of the house abroad. Before this had been done, and while the bills were in their possession, the

often depend upon the negotiability of the paper. Frequently these come into conflict with those of the assignee, or of other parties; and in such cases the general rule would seem to be, that the bankruptcy overrides the commercial law or rules, and the title of an innocent party is made to yield to that of the assignee, where it would be available against any others Hence a bankrupt's transfer, by his bill, of funds in the hands of a drawee, would be invalid against the assignees who take these funds by the bankruptcy. (*d*) But if the bill were drawn for more than the funds, and was accepted, the holder could recover from the acceptor the excess of the amount of the bill over the funds in his hands. (*e*) This applies, however, only when

firm in London failed, and their assignees took possession of these bills. A petition having been filed praying that these bills might be taken from the assignee, and returned to the petitioners, the Vice-Chancellor said: "In cases of this nature the case always turns upon the fact whether the bills are remitted in order that the party to whom they are sent may recover the amount, as the agent of the party remitting, or whether the bills are so sent, on a general account between the parties, that the person receiving them has a right to deal with them for his own use. Certainly, bankers are the persons who are employed in such agencies; but a merchant, or any other person, may be so employed. . . . . . In this case, the admitted facts exclude all doubts as to the actual nature of the transaction. Messrs. Power & Co. are desired to do the needful with the bills, and to place the amount to the credit of the petitioners when in cash. In answer, Messrs. Power & Co. say, 'The needful shall be done.' They were bound, therefore, to receive the amount of the bills, as the agent of the party remitting, and were not at liberty to deal with the bills for their purposes." So they did not pass to the assignees.

(*d*) Willis *v.* Freeman, 12 East, 656. This was an action against the defendants as acceptors of a bill of exchange for 1,400*l.*, drawn by one Anderson, payable to his own order, and indorsed by him to the plaintiff for value. And the defence was, that in consequence of a prior act of bankruptcy by Anderson, which had since been followed by a commission, Anderson's indorsement transferred no right to the plaintiff. Other facts in this case will be stated in the notes below. Of the point here considered, Lord *Ellenborough* said: "It may be considered as clear, that, except in cases provided for by particular statutes, a trader who has committed an act of bankruptcy, upon which a commission afterwards issues, can make no transfer of his property to the prejudice of his assignees, nor do any act to interfere with their rights; but every such attempted transfer or act is liable to be vacated by his assignees. On the other hand, when it does not affect the rights and interests of the assignees, the act of a man who has committed an act of bankruptcy has the same effect as the act of any other person. The question, therefore, for consideration here is, whether this indorsement by Anderson, if allowed to be effectual, could prejudice his assignees, or interfere with their rights, because, so far forth as it would do so, it would be inoperative."

(*e*) Wilkins *v.* Casey, 7 T. R. 711. The case of Willis *v.* Freeman, above cited, also is an authority upon this point. In that case, the trader, after the secret act of bankruptcy, as above set forth, having securities in his banker's hands to a certain amount, drew on them a bill for a larger amount for his accommodation, payable to his order, which, after acceptance, he indorsed to the plaintiff (who knew of his partial insolvency, but not of the act of bankruptcy), the commission having been subsequently taken out, it was held that the plaintiff, who was to make title through the bankrupt's indorsement after his bankruptcy, though he was entitled to sue the acceptors upon the bill, could only recover on it *the amount of the sum* accepted for *the accommodation of the*

some act of the bankrupt is necessary to make out a party's title; for if he can rest his claim on his own equity, it would be good. Nor can the assignees take paper which was transferred by indorsement of the bankrupt after bankruptcy, if it be such that they could not make it available for the funds of the assignment. Thus, if the bankrupt indorsed over accommodation paper, which he might indorse but could not sue, the assignees do not take it. (*f*) So if bankers or others held commercial paper only for the owners, if they are insolvent it does not go to their assignees. It is sometimes difficult to determine the facts on which this question turns; but, in general, the rule is this. If the insolvent held the paper only for collection, the assignee does not take it. If he has held it to collect and hold in any trust, or for any especial purpose, and had placed or held the proceeds in separate or special deposit, applicable to a special purpose, the assignees do not take the proceeds. If he had advanced money on the paper, the assignees take his claim for reimbursement and his lien. If he had discounted the paper, or made it his own otherwise, as by purchase, then the assignee takes it. Generally, (*g*) if the insolvent holds such paper, even by a legal title, but the beneficial interest is in another, the assignee does not take it. (*h*)

bankrupt over and above the amount of the bankrupt's effects in the hands of the acceptors at the time of the bankruptcy. And this on the ground that, by his recovery, the amount of the assignees and creditors would not be damnified.

(*f*) Arden *v.* Watkins, 3 East, 317. It seems that the same principles will govern the case of accommodation paper, when proof of it is attempted against a bankrupt's estate, as would apply if suit had been brought upon it against the bankrupt; and the same reasons hold when the bankrupt has given accommodation notes or acceptances. It is clear, on the authorities, that no action could be maintained in either of the above cases. Smith *v.* Knox, 3 Esp. 46; Fentum *v.* Pocock, 5 Taunt. 192; Thompson *v.* Shepherd, 12 Met. 311; Brown *v.* Mott, 7 Johns. 361; Grant *v.* Ellicott, 7 Wend. 227; Charles *v.* Marsden, 1 Taunt. 224; Carruthers *v.* West, 11 Q. B. 143; Renwick *v.* Williams, 2 Md. 356; Molson *v.* Hawley, 1 Blatchf. C. C. 409. If the accommodation bill is in the hands of a third party, who took it *bona fide*, even with notice of its being an accommodation bill, he may prove against the estate of either party to it, and recover a dividend on it to the amount due him. Smith *v.* Knox, above cited, and 5 Taunt. 192; *Ex parte* Bloxham, 6 Ves. 449, 600; *Ex parte* Bloxham, 8 Ves. 531; Bank of Ireland *v.* Beresford, 6 Dow, 238; *Ex parte* King, Cooke, 157; *Ex parte* Lee, 1 P. Wms. 782. See Jones *v.* Hibbert, 2 Starkie, 304.

(*g*) Kitchen *v.* Bartsch, 7 East, 53; Giles *v.* Perkins, 9 id. 12; Tennant *v.* Strachan, 4 C. & P. 31.

(*h*) Anonymous, in the notes, 1 Camp. 492; Bourne *v.* Cabot, 3 Met. 305; Waller *v.* Drakeford, 1 Starkie, 481; Greening, *ex parte*, 13 Ves. 206; *Ex parte* Deey, 2 Cox, 424; Watkins *v.* Maule, 2 Jacob & W. 243; Smith *v.* Pickering, Peake, N. P. 50; *Ex parte* Hall, 1 Rose, 13; *Ex parte* Rowton, id. 15.

It has been held, on strong grounds, and apparently in conformity with established principles, that an assignee takes the benefit of a promise made to the insolvent, which could be available only on the happening of a contingency, as a successful termination of a suit, which did not happen until after the insolvency. (*i*)

Where an assignee sues for damages, the measure to him is not always the injury to the estate, for he rests upon a strict legal right. (*j*)

SECTION IX.

WHAT INTERESTS OR PROPERTY OF THE BANKRUPT DO NOT PASS TO THE ASSIGNEE.

As it is the purpose of the insolvent laws to give to the creditors all they could take by attachment or levy, so it gives them nothing more. In all the States, some specified property of certain kinds, real and personal, is exempt from attachment, and generally, at least, the same is exempt from the operation of the insolvent laws. It would seem, however, that a person may lose the benefit of this exemption, by his own laches; thus, it has been held in Massachusetts, that if a debtor, who has a larger quantity of any kind of provisions than the law exempts from attachment, sets apart no portion thereof for the use of his family before it is about to be attached, and makes no claim to any portion of it when the officer is about to attach the whole, he cannot maintain an action against the officer who takes the whole. (*k*) Where this exemption is for a certain amount of property, the question has been raised, whether this relieves merchandise of that value, or is confined to household goods, or other similar things. This must be a question of construction

(*i*) *Johnson*, C. J., in Burton *v.* Lockert, 4 Eng. 411.

(*j*) Hill *v.* Smith, 12 M. & W. 618; Thorpe *v.* Thorpe, 3 B. & Ad. 580; Colson *v.* Welsh, 1 Esp. 379. See also, Porter *v.* Vorley, 9 Bing. 93, s. c. 2 Moore & S. 141.

(*k*) Clapp *v.* Thomas, 5 Allen, 158.

of a statute. But, on general principles, we should not extend the exemption to merchandise

It has been said, that all rights of action pass to the assignee; but there is one broad exception to this. No rights of action for mere personal injury pass. (*l*) None, for example, for assault and battery, and none for slander. (*m*) And it has been held,

(*l*) Stone *v.* Boston & Maine Railroad, 7 Gray, 539.

(*m*) Rogers *v.* Spence, 13 M. & W. 571. This was an action of trespass for breaking and entering the dwelling-house and garden of the plaintiff, and making a great noise and disturbance therein, damaging the doors, &c., of the house, and the trees, &c., of the garden, and seizing certain goods of plaintiff, and exposing them to sale on the premises without his leave; whereby the plaintiff and his family were greatly disturbed and annoyed in the peaceable possession of the dwelling-house and garden, and the plaintiff was prevented from carrying on his lawful business. The defendant pleaded in bar, that the plaintiff became bankrupt after the action brought, and that an assignee had been appointed, who accepted, &c., and that thereby, under the statute, the cause of action became vested in the assignee. Demurrer to the plea, and judgment for the plaintiff. See 11 M. & W. 791. Held, on error brought, that the plea was bad. Lord *Denman* said, ably defining the doctrine on this subject: "As the object of the law is manifestly to benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has, in furtherance of this object, been construed largely, so as to pass not only what in strictness may be called the property and debts of the bankrupt, but also those rights of action to which he was entitled, for the purpose of recovering in specie real or personal property, or damages in respect of that which has been unlawfully damnified in value, withheld, or taken from him; but causes of action not falling within this description, but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy whether his property were diminished or impaired, or not, are clearly not within the letter, and have never been held to be within the spirit, of the enactment, even in cases where injuries of this kind may have been accompanied or followed by loss of property; and to this class we think the action of trespass *quare clausum fregit*, and that of trespass to the goods of the bankrupt, must be considered to belong. These rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property; they are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred; and even when such an incident has accompanied or followed a wrong of this description, the primary personal injury to the bankrupt being the principal and essential cause of action, still remains in him, and does not vest in the assignee, either as his property, or his debts." s. c. on Appeal, 12 Clark & F. 700. In Howard *v.* Crowther, 8 M. & W. 601, which was a case for the seduction of the sister and servant of plaintiff, Lord *Abinger*, C. B., said: "Has it ever been contended that the assignees of a bankrupt can recover for his wife's adultery or for an assault? How can they represent his wounded feelings? Nothing is more clear than that a right of action for an injury to the property of the bankrupt will pass to his assignees; but it is otherwise as to an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings." *Alderson*, B., said: "The service, for the loss of which this action is brought, *is of more value to one person than another*, and the loss of it is, therefore, only a personal injury." Bird *v.* Hempstead, 3 Day, 272; Stanly *v.* Duhurst, 2 Root, 52; Nichols *v.* Bellows, 22 Vt. 581. As early as the case of Benson *v.* Flower, Sir W. Jones, 215, it was held, that no action for slander passed to the assignee. Clark *v.* Calvert, 8 Taunt. 742, 3 Moore, 96; Shoemaker *v.* Keeley, 1 Yeates, 245, 2 Dall. 213; Smith *v.* Milles, 1 T. R. 475; Brandon *v.* Pate, 2 H. Bl. 308. The distinction seems to rest upon the solution of the questions, Have the assignees lost any

that the assignee took no right of action for breach of contract to employ the insolvent in a certain way for certain wages; but this has been overruled. (*n*) It may sometimes be difficult to draw the line between the rights of this kind which the assignees take, and those which they cannot; but the general rule would seem to be, that the right to damages passes from

thing? What are they entitled to? The bankrupt's property. If, then, that property has been converted or injured, they may bring an action; but they cannot be said to have a property in the personal feelings, or even reputation of the bankrupt. In Wright *v.* Fairfield, 2 B. & Ad. 727, the right of assignees to sue on contracts and *for injuries affecting the bankrupt's property* was declared. Hancock *v.* Coffyn, 8 Bing. 358, 1 Moore & S. 521; Bennett *v.* Allcott, 2 T. R. 166; Porter *v.* Vorley, 9 Bing. 93, 2 Moore and S. 141; Brewer *v.* Dew, 11 M. & W. 625; Chippendale *v.* Tomlinson, 1 Cooke, 106; Clarkson *v.* Parker, 7 Dowl. 87; Splidt *v.* Bowles, 10 East, 279; Kymer *v.* Larkin, 2 Moore & P. 183; Rouch *v.* Great Western Railway Co. 1 Q. B. 51. So it is held, that a covenant to renew a lease in favor of one who subsequently becomes bankrupt, will not be enforced in equity in favor of his assignees. Drake *v.* The Mayor of Exon, 1 Ch. Ca. 71, 2 Freem. 183; Moyses *v.* Little, 2 Vern. 194, 1 Eq. Ca. Abr. 53, pl. 1; Brooke *v.* Hewitt, 3 Ves. 253; Willingham *v.* Joyce, id. 168; Buckland *v.* Hall, 8 id. 92; Vandenanker *v.* Desbrough, 2 Vern. 96. So with an agreement for a lease for the *personal accommodation* of the bankrupt. Flood *v.* Finlay, 2 Ball & B. 9.

(*n*) Beckham *v.* Drake, 8 M. & W. 846, 9 id. 79. Judgment reversed in the Exchequer Chamber, 11 id. 315. The facts briefly were, that A agreed, in writing, with B and C, on behalf of themselves and D, as partners in trade, to serve them, B and C, and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account during that period without their consent; and B and C agreed to pay him wages after the rate of £3 3*s.* per week so long as he should serve them faithfully. The Court of Exchequer held, by *Parke*, B., that, as the contract related to the employment of the personal skill and labor of the bankrupt, and the damages for the breach of it being compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate, the right of action did not pass to his assignees. On error, brought to the Exchequer Chamber, it was held, *Denman*, C. J., delivering the opinion of the court, that the right of action for the dismissal of A without reasonable cause, passed to his assignees in bankruptcy, as being part of his personal estate, whereof a profit might be made. It will be seen that the difference of opinion was not so much upon the principle as upon the application of the principle to the facts before the court. Lord *Denman* said: "It was further argued, that as this contract related to the person of the bankrupt, the right of action will not pass. There is no doubt that a right of action for an injury to the body or feelings of a trader, arising from a tort independent of contract, does not pass to his assignees, ex. gr. for an assault and battery, or for slander, or for the seduction of a child or servant, and the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or to marry; and if, in the case last supposed, a consequential damage to the personal estate follows from the injury to the person, that may be so dependent upon and inseparable from the personal injury which is the primary cause of action, that no right to maintain a separate action, in respect of such consequential damage, will pass to the assignees of a bankrupt. In all those cases, the primary cause of action, if of a nature, properly speaking, personal, and the right to maintain it, would die with the bankrupt. In the present case, although the contract was for the personal skill and labor of the bankrupt, the breach of that contract does not appear to cause him any other injury than the diminution of his personal estate. *In the cases referred to, the injury (if any) to the personal estate, is a consequence of an injury to the person; in this case, the injury to the person (if any) is a consequence of the injury to the personal estate.*"

the insolvent to his assignees only where the right springs from damage actually done to property, or distinctly connected with property. (*o*) And even here it is obvious that cases might occur which would not come under this rule. Thus, the insolvent's claim against a man who beat his horse and injured him, or who had poisoned his cattle, would not, on general principles, pass to the assignee. All rights of this kind, which do not pass to the assignee, must, under the general rule, remain with the insolvent; and we should say, therefore, that if he had, before bankruptcy, commenced an action for assault and battery, or any other action, the right of which did not pass, and he became bankrupt pending the suit, he could continue to carry on the suit for his own benefit. But if the claim had been reduced to a judgment before the insolvency, there would be strong reason for saying that this judgment passed to the assignees, because it was now merely a settled and vested claim for money. (*p*) If this judgment had been satisfied, the money in his hands would, of course, go with the rest of his assets.

The choses in action of the wife pass to the assignee, as we have seen; but he acquires no interest in any property, real or personal, which is secured to her separate use by the intervention of trustees; or without trustees, by operation of law or in conformity with law. For here the husband could not interfere, nor give his creditors or his assignees a right to interfere. (*q*)

(*o*) See the language of Lord *Denman* in Drake *v.* Beckham, 11 M. & W. 315, above quoted.

(*p*) See Stone *v.* Boston & Maine Railroad, 7 Gray, 539.

(*q*) Bennet *v.* Davis, 2 P. Wms. 316; Robinson *v.* Taylor, 2 Bro. C. C. 589; Haselington *v.* Gill, 3 T. R. 620, note; Jarman *v.* Woolloton, id. 618; Tullett *v.* Armstrong, 4 Mylne & C. 377; Kensington *v.* Dolland, 2 Mylne & K. 184; *Ex parte* Killick, 3 Mont., D. & De G. 480; Caunt *v.* Ward, 7 Bing. 608; *Ex parte* Coysegame, 1 Atk. 192, Cooke, B. L. 269; Roberts *v.* Spicer, 5 Madd. 491; *Ex parte* Beilby, 1 Glyn & J. 167; Carne *v.* Brice, 7 M. & W. 183; Mahoney *v.* Porter, 3 Cush. 417. In the matter of Snow and wife, 5 Law Rep. 369; Shaw *v.* Mitchell, id. 453; Vandenanker *v.* Desborough, 2 Vern. 96; Jacobson *v.* Williams, 1 P. Wms. 382; Bosvil *v.* Brander, id. 458; Tyrrell *v.* Hope, 2 Atk. 558; 2 Roper on Real Property, 159. But it seems that if the wife buy goods, as wearing apparel, with the income of money settled to her separate use, those goods, after purchase, are the property of the husband, and in case of his bankruptcy will pass to his assignees, unless exempted by statute. Carne *v.* Brice, above cited. So, money deposited in a bank by a married woman who lives separate from her husband, and is not supported by him, is the property of the husband, though deposited in her name, and so may be reached by the creditors of the husband, and consequently will pass

The United States bankrupt law exempted wearing apparel; (*r*) but it was held, that articles of jewelry were not exempt under this clause. (*s*) But it was held, in the District Court in New York, that such articles, if they belonged to the wife before marriage, or were given to her after marriage, and were not unsuitable in their value to her condition, might be retained by her. (*t*) Our State statutes frequently contain a similar clause of exemption, which, it might be supposed, would be similarly construed. In Massachusetts, Judge Story put all these things on the footing of a trust, and withheld them from the assignee only where the husband could be regarded as the trustee of the wife. On this ground, he ordered a watch given to her by her husband after marriage, to be surrendered to his assignees; but permitted her to retain a mourning ring given her by her friend. So it was held, that watches given to children by a friend did not pass to the assignee of the father; nor would they if they were given by the father himself in good faith, and were suitable in kind and value to the condition and wants of the children. But if they were more than this, it would be or at least operate as a fraud upon the creditors, to take them from the estate. (*u*)

to the assignees. Ames *v.* Chew, 5 Met. 320. Where there was a devise to the separate use of the wife, and no trustees appointed, the court said they would make the husband a trustee for her, and ordered the assignees to convey to a Master for her separate use. Bennet *v.* Davis, 2 P. Wms. 316.

(*r*) The substance of the provision of exemption, which would seem to be in most respects adopted in the various insolvent laws, includes the necessary household and kitchen furniture of the bankrupt, and such other articles and necessaries as the assignee might designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and also the wearing apparel of the bankrupt, and that of his wife and children.

(*s*) In the matter of Kasson, 4 Law Rep. 489. In the matter of Grant, 5 id. 11, 2 Story, 312.

(*t* In the matter of Kasson, 4 Law Rep. 489. The abstract of this case is substantially the proposition of the text. We have been unable to obtain the opinion of Judge *Betts* in the case.

(*u*) In the matter of Grant, 2 Story, 312, 5 Law Rep. 11. This was a petition in bankruptcy. The facts stated in the petition, so far as material to the present discussion, were, that the wife of the petitioner was possessed of a watch of about the value of fifty dollars, presented to her by the petitioner about ten years before the filing of the petition; that she had likewise several mourning rings and pins, and a few other articles of jewelry of the value of about twenty-five dollars, some of which had been given her by friends, and others by the petitioner some years previous, and one mourning ring of the value of about five dollars, given her by the petitioner nearly two years before filing the petition. The petitioner further stated that his two sons, of the respective ages of seventeen and twenty years, had each a gold watch of the value of about fifty dollars, which had been purchased about

SECTION X.

OF THE QUESTION OF TIME.

This may be important in the law of bankruptcy, in either of two ways. One refers to the moment when the bankrupt loses his power over his effects, or, in fact, loses his property in them, because they have passed to his assignees. Of course, after this moment a transfer by the bankrupt is wholly void; and it is therefore important to determine what is this point of time.

In England the lien of the assignees was held to have attached on the commission of the first act of bankruptcy by the bankrupt; and there are strong cases showing that any act of his or of his agent afterwards was void. (v) But though the

two years before with money given by a friend, and with about twenty-eight dollars given to each by the petitioner, out of his private cash. After *Story*, J., had recited the principal facts, he said: "The watch of the wife and any jewelry given to her by third persons before the marriage, or by her husband either before or since the marriage, pass to the assignee as part of the property of the bankrupt, to which his creditors are entitled. But jewelry given by third persons to the wife since her marriage as personal ornaments, and mourning rings given to her by third persons since the marriage, as personal memorials, belong to the wife for her sole and separate use in equity, and do not pass to the assignee under the bankruptcy for the benefit of the creditors. That the watches of the sons, under the circumstances stated in the petition, belong to them as their property. But, nevertheless, if the petitioner was insolvent when he applied a part of his own money to purchase the same for his sons, he had no right so to do, against the claims of the creditors; and that in equity, therefore, if the petitioner was so insolvent, the sons must account to the assignee for the amount of the money of the petitioner so paid towards the purchase of the watches. But if the petitioner was not then insolvent, and the donation on his part was made *bonâ fide*, and the donation was suitable to his rank in life, condition, and estates, then it was good, and not within the reach of the creditors, or in fraud of their rights under the bankruptcy."

(v) Kynaston *v.* Crouch, 14 M. & W 266. In this case, one Blake, a trader, had committed a secret act of bankruptcy, by leaving his house, but before he left, desired his foreman, the defendant, who had been accustomed to manage his business for him, to carry it on in his absence. The defendant did so, and received for goods sold, and for debts previously due the bankrupt, the sum of £153 13*s.*; but of this amount, he made sundry *bonâ fide* payments, some to creditors of the bankrupt and some for wages due himself. The moneys were received, and the payments made, without any notice of the act of bankruptcy. The assignees brought this action to recover the £153, &c., as money had and received to their use. Plea, never indebted, and set-off of the payments made. *Held*, that the assignees were entitled to recover all the money received by him after the act of bankruptcy, and that he was not entitled to set off the payments he had made, though, under a special plea, he might have protected himself, so far as the payment made without

rule itself seems to be well settled there, some doubt exists as to its ground. But this was confined to cases of bankruptcy, where the proceeding is *in invitum*. Whether the reason of the rule would require that in cases of insolvency this point of time should occur at the filing of the petition of the insolvent, or at the first publication of the insolvency, is not certain. For the first conclusion it may be said, that his petition is an act of surrender by the insolvent of all his property, to be dealt with by the law. For the other, that the first construction might operate as a fraud upon the public, that is, upon those who dealt with the insolvent after his petition, in good faith, and in ignorance of it. And certainly some of the English cases have this aspect. (*w*) But if the moment when the insolvent loses his power over his property, is the same with that at which the public is notified of the fact, this objection ceases to apply And this last is the view prevailing in this country. (*x*) The

notice of the act of bankruptcy was concerned. Pearson *v.* Graham, 6 A. & E. 899, 2 Nev. & P. 636; Vernon *v.* Hankey, 2 T. R. 113; Turquand *v.* Vanderplank, 10 M. & W. 180; Stephens *v.* Elwall, 4 M. & S. 259; Thomason *v.* Frere, 10 East, 418; Drayton *v.* Dale, 2 B. & C. 293. But when a trader, in person, employed an auctioneer to sell goods, who sent him the proceeds by the hands of the defendant, the trader having become bankrupt, by lying two months in prison, it was *held*, that his assignees could not recover from the defendant, who was a mere bearer, the money he had so received and paid over. Coles *v.* Wight, 4 Taunt. 198; Coles *v.* Robins, 3 Camp. 183; Tope *v.* Hockin, 7 B. & C. 101; Shaw *v.* Batley, 4 B. & Ad. 801. And where one had bought goods, *bonâ fide*, of a trader who had previously committed an act of bankruptcy, and paid for them, without knowledge of the bankruptcy, it was *held*, that the assignees of the seller could not maintain trover for the goods, the payment having been protected by stat. 1, Jac. 1, c. 15, § 14; Cash *v.* Young, 2 B. & C. 413; Rouch *v.* The Great Western Railway Co. 1 Q. B. 51; Tripp *v.* Armitage, 4 M. & W. 687.

(*w*) Kynaston *v.* Crouch, 14 M. & W. 266, above stated. See Hurst *v.* Gwennap, 3 Stark. 306; Saunderson *v.* Gregg, 3 id. 72; Cash *v.* Young, 2 B. & C. 412. See also, Copland *v.* Stein, 8 T. R. 199.

(*x*) For such a provision will be found incorporated in most of our insolvent laws. The language of *Shaw*, C. J., in Clarke *v.* Minot, 4 Met. 346, upon this point, may be quoted: "This question depends upon the provisions of the insolvent law determining the time at which the assignment shall take effect, so as to divest the property of the insolvent in his real and personal estate and choses in action, and vest the same in his assignees. This clearly is not the time of the act of assignment, for that is always some time after the commencement of the proceedings, and by the terms of the statute it relates back to an anterior period. One other consideration must be obvious — which is, that the judge, by such assignment, merely executed a power devolved by law upon him; he conveys no interest of his own; the property which passes by it is transferred by force of the statute, and therefore the legal effect of such transfer depends little upon the terms of the assignment, either as to the property transferred, or the time at which it shall take effect. But the legal effect and operation of the assignment, in these respects, must depend upon the provisions of the assignment. It is purely a statute title, under which an assignee claims

time, however, is usually settled by statutory provisions, leaving little question of law.

It has been held, that where land was seized on execution before the publication, and the levy completed afterwards, the creditor took the land, and not the assignee, because the levy, by relation of law, referred back to the time of the seizure on execution. (*y*)

But the question of time has also another importance. Our national bankrupt law contained, and many, if not all of our statutes of insolvency contain, a provision as to the length of time, before insolvency, which must intervene to make certain transfers by the insolvent, made in contemplation of insolvency, void. (*z*) This differs in the different statutes. In the bankrupt law it was two months before the decree of bankruptcy. If before this time a party deal with the bankrupt in good faith he is unaffected by any fraud on the part of the defendant. And it was held in England, where the time expired on the filing of the petition, that in computing this time, the day on which the transaction took place, or the day on which the petition was filed, must be excluded. (*a*) And the very hours when the

either the goods or choses in action of the insolvent; and to the statute we must look for the nature and extent of that title." And so it was held, that under the Massachusetts statute, the transfer took place at the time of publication. *Prentiss*, J., in Downer *v.* Brackett, 5 Law Rep. 392. The case of Kittridge *v.* McLaughlin, 33 Me. 327, seems *contra*, but it is to be observed that the doctrine laid down in a portion of the head note, on this point, was not expressly or directly maintained by the court, and that so far as the *time* of the transfer, as between that of the petition, and the publication, the point did not come up in the case.

(*y*) Cushing *v.* Arnold, 9 Met. 23. *Dewey*, J., said: "The second objection to the levy of the execution is, that it had not taken effect so as to divest the property of the debtor, before the institution of the proceedings in insolvency, and therefore the estate passed to the assignee. The extent of the right of the assignee under the deed of assignment, and to what period of time it attaches, are questions now very well settled. Such deed transfers all the property of the insolvent as held at the time of the first publication by the messenger. It is admitted that the levy was commenced before the petition for proceedings in insolvency was filed, but it is said that it was not completed till after publication. But as well by statute as by the decisions of this court, the levy of an execution is to take effect from the time of the seizure on execution." Heywood *v.* Hildreth, 9 Mass. 393; Waterhouse *v.* Waite, 11 id. 210.

(*z*) The clause of the late National Bankrupt Law was: "Provided, that all dealings and transactions by and with any bankrupt, *bona fide* made and entered into more than two months before the petition filed against him, shall not be invalidated or affected by this act." A similar provision will be found incorporated into the English statute, 12 & 13 Vict. c. 106.

(*a*) Cowie *v.* Harris, 1 Moody & M. 141. In this case the commission in bankruptcy was issued on the 14th of May, 1825. Goods of the bankrupt had been deposited with a pawnbroker, on the 14th

events take place are to be regarded, at least in some cases, as fractions of days are considered by the court. This last rule was adopted by Story, J., but denied in Vermont. (*b*)

It may be added, that if fraud of any kind is attempted by the bankrupt at any time, the transaction is void so far as relates to him; and also so far as relates to any parties dealing with him, with a knowledge that the transaction is fraudulent on his part. (*c*)

SECTION XI.

WHAT DEBTS ARE PROVABLE AGAINST THE ESTATE.

In general, it may be said, all debts and claims whatever. (*d*) They may be due and payable at the time, or not payable until

of March, 1825. The attorney-general, for the plaintiffs, did not contend that they were deposited within the two months, and Lord *Tenterden*, C. J., said: "With respect to the goods deposited on the 14th, the right of the plaintiffs will depend upon the validity of the transaction as between the bankrupt and the creditor; for both days cannot be reckoned inclusively so as to make March the 14th not more than two calendar months before May the 14th, the date of the commission." S. P., *Ex parte* Farquhar, 1 Mont. & McA. 7.

(*b*) Thomas, assignee of Houlbrooke, *v.* Desanges, 2 B. & Ald. 586. In this case, the facts were, that the bankrupt was surrendered in discharge of his bail on June 1st, 1818, between six and eight o'clock in the evening, and on the same day, between one and two o'clock in the afternoon, a writ of *fieri facias* was delivered to the defendants, who, by their officer, entered into the bankrupt's premises, and seized the goods. The bankrupt lay in prison more than two months afterwards. The plaintiffs insisted, that the act of bankruptcy having been committed on the same day that the goods were taken in execution, the plaintiffs must in law be considered as having the property of the goods vested in them during the whole of that day, because there can be no fraction of a day. *Abbott*, C. J., thought that the court might notice the fraction of a day in this case, and nonsuited the plaintiffs, and a rule to set aside the nonsuit was refused. In the matter of Richardson, 2 Story, 571, *Story*, J., said: "I am aware that it is often laid down that in law there is no fraction of a day. But this doctrine is true only *sub modo* and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and therefore like all other legal fictions, is never allowed to operate against the right and justice of the case." S. P., Sadler *v.* Leigh, 4 Camp. 197; *Ex parte* Farquhar, 1 Mont. & McA. 7; *Ex parte* D'Obree, 8 Ves. 82; Wydown's Case, 14 id. 87. We are aware of no cases where the technical rule of the law, that no fraction of a day can be allowed, has been adhered to in bankruptcy, save In the matter of David Howes, 6 Law Reporter, 297; and In the matter of Welman, 7 id. 25, where the doctrine laid down in the first case is maintained and defended. The authorities are reviewed in the opinion of the court at some length, and the views of the judge, though savoring of technicality, are ably sustained. The doctrine of the majority of the cases seems to be a wholesome one, and which may well be maintained on the reasoning of Mr. Justice Story.

(*c*) See the cases cited in sect. 8, note (*i*), to the point that the assignees may sue for and recover any goods fraudulently conveyed by the bankrupt.

(*d*) Archbold on Bankruptcy, Deacon

later. (*e*) They may be payable only on contingency, if the contingency be rational and real, or if the uncertainty be not excessive. (*f*) Thus, a surety, or an indorser for the insolvent,

on Bankruptcy, Eden on the Bankrupt Law, tit. Proof of Debts. In Downer *v.* Brackett, 5 Law Rep. 392, *Prentiss*, J., said: "All the property then owned by the bankrupt passes to and vests in the assignee, and consequently all debts existing before and at the date of the decree are provable under the bankruptcy, and all debts up to that time passed by the bankrupt's certificate of discharge." Spalding *v.* Dixon, 21 Vt. 45, 14 Law Reporter, 88; Harrington *v.* McNaughton, 20 Vt. 293. The exceptions to this general rule occur in the next section of this work. And in a recent case in New York, it was said that the question, what debts are provable, is one of mixed law and fact; but the question, whether the debts due at the time of the bankruptcy are discharged, is one purely of law, and for the decision of the court, on production and examination of the papers before the court of insolvency, and the certificate. Dresser *v.* Brooks, 3 Barb. 429.

(*e*) Parslowe *v.* Dearlove, 4 East, 438. This was an action of assumpsit by a schoolmaster, for the education, &c., of defendant's children. Defendant pleaded non-assumpsit and his bankruptcy, and certificate. At the trial it appeared that the school-money had been payable half yearly; that the half year for which the plaintiff now sought to recover, ended on the 26th of June last, when the holidays commenced; but that the defendant had taken his children home for the holidays, on the 18th of June, and became a bankrupt on the 20th. The question was, whether this was a debt provable under the commission. On this a verdict was taken for the plaintiff; a rule to set aside the verdict was refused. Lord *Ellenborough* said: "The question then is, whether this can be considered as a *debt* due at the time of the bankruptcy: in other words, whether, under a contract to pay a certain sum half yearly, the money can be said to be due before the end of the half year? This is nothing like a *debitum in præsenti*. It would depend upon the due performance of the engagement on the part of the schoolmaster. It was a subsisting contract at the time of the bankruptcy; the children were not taken away from the school, but went home for the holidays." It was admitted on the argument, and by the court, that had the debt been fully due, though not payable, it could have been proved, and would have been barred by the certificate. In England, before the statute 49 Geo. III., c. 121, if a creditor had no security for his debt *in writing*, and it was not payable till after his debtor became bankrupt, as in the case, for instance, of goods sold to the bankrupt on a certain credit, the creditor was not allowed to prove his debt under the commission. *Ex parte* East India Co. 2 P. Wms. 395; Hoskins *v.* Duperoy, 9 East, 498. By that section, all debts contracted before the act of bankruptcy, though not due till afterwards, can be proved, whether there is written security or not, subject to a deduction of £5 per cent. interest. The same provision, with little modification, has been adopted in the later English statutes, and in most of the recent insolvent laws. See further, Utterson *v.* Vernon, 4 T. R. 570; *Ex parte* Minet, 14 Ves. 189; Hammond *v.* Toulmin, 7 T. R. 612; *Ex parte* Grome, 1 Atk. 115; *Ex parte* Marc, 8 Ves. 335; *Ex parte* King, id. 334; *Ex parte* Winchester, 1 Atk. 116; *Ex parte* Dowman, 2 Glyn & J. 241; *Ex parte* Elgar, id. 1; Clayton *v.* Gosling, 5 B. & C. 360. And in such case the amount to be proved is the full amount of the debt itself without the deduction of interest. That rebate will be made when the dividend is computed. *Ex parte* Hill, 2 Deacon, 249; Cothay *v.* Murray, 1 Camp. 335; *Ex parte* Elgar, above cited; *Ex parte* Dowman, id.

(*f*) Provisions relating to the proof of contingent claims occur in the English statute of Bankruptcy, 12 & 13 Vict. c. 106, in the late National Bankrupt Act, and in most of the statutes of the States, on insolvency. The distinction on this subject is well settled between subsisting debts, which are payable on a contingency, and contingent liabilities which may never become debts; and it is held, that the former only can be proved under a commission in bankruptcy. In *Ex parte* Marshall, 3 Deacon & Ch. 120, *Erskine*, C. J., said: "In my judgment, in *Ex parte* Myers (cited below), I have not sufficiently marked the distinction between contingent liabilities which may never become debts, and contingent debts that may never become payable. Upon the

on a debt or note not due, will undoubtedly be called upon, as the insolvency of the principal is the very circumstance to render him liable; nor would a surety who had another surety before him, or a second or third indorser, be prevented from guarding against the contingency of his liability, by proving his claims. (g) All rent due is provable; and, as we have seen

fullest consideration of all the reported decisions, I am satisfied that claims under the first class, upon which no debt has arisen until after the bankruptcy, cannot be proved under the 56th section; but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy and before proof is tendered, may be admitted." The case of *Ex parte* Thompson, 2 Deacon & Ch. 126, 1 Mont. & B. 219, is an example of the first class. Here there was no debt due from any one till after the bankruptcy. *Ex parte* Myers, 2 Deacon & Ch. 251, 1 Mont. & B. 229, is an example of the last class. In this case a debt had been clearly contracted with the holders of the bills before the bankruptcy, for a specific sum, which the bankrupt had engaged to pay, unless he should be released from his obligation by the drawer taking up the bills. In *Ex parte* Tindal, 1 Deacon & Ch. 291, a bankrupt had covenanted by marriage settlement that his heirs, &c., should, after his decease, pay £4,000 to trustees upon trust, to pay the interest to his intended wife for her life; and, after her death, then to pay the principal sum to the children of the marriage; and if no children, to the wife, if she survived her husband; but if not, then to the executors of the husband. Proof of this in bankruptcy was rejected by the commissioners as no debt, but a contingent liability, which might become one. Sir Launcelot *Shadwell* reversed the decision. 1 Mont. & M. 415. Lord *Lyndhurst* reversed his decision, on appeal. Id. 422. Lord *Brougham*, assisted by *Tindal*, C. J., and *Littledale*, J., reversed *his* decision, on a rehearing; and held, that this covenant constituted a *debt*, contracted by the bankrupt, payable on a *contingency*, and capable of *valuation*, and therefore provable. Utterson *v.* Vernon, 4 T. R. 570. The following cases set forth the same distinction, and what debts are provable under the head of contingent claims. Abbott *v.* Hicks, 5 Bing. N. C. 578; Hinton *v* Acraman, 2 C. B. 367; *Ex parte* Harrison, 3 Mont., D. & De G., 350; *Ex parte* Marshall, 2 Deacon & Ch. 589, s. c. 1 Mont. & B. 242; *Ex parte* Tindal, 1 Moore & S. 607, Mont. 375, 462, 8 Bing. 402; Atwood *v.* Partridge, 12 J. B. Moore, 431, 4 Bing. 209; Boorman *v.* Nash, 9 B. & C. 145; Green *v.* Bicknell, 8 A. & E. 701; *Ex parte* Lancaster Canal Co., Mont. 27; *Ex parte* Fairlie, id. 17; *Ex parte* Myers, Mont. & B. 229, 2 Deacon & Ch. 251; Abbott *v.* Hicks, 7 Scott, 715; Hope *v.* Booth, 1 B. & Ad. 498; *Ex parte* Simpson, 1 Mont. & A. 541; 2 Deacon & Ch. 792; Woodard *v.* Herbert, 24 Maine, 358; Hancock *v.* Entwisle, 3 T. R. 435. So, when the debt is due, but may be defeated on the happening of any given event, it may still be proved, liable to a withholding of the dividend, unless the contingency occur. Staines *v.* Plank, 8 T. R. 389; Yallop *v.* Ebers, 1 B. & Ad. 698; Filbey *v.* Lawford, 4 Scott, N. R. 206; *Ex parte* Eyre, 1 Phillips, 227; Lane *v.* Burghart, 1 Q. B. 933, 1 Gale & D. 311; Lane *v.* Burghart, 4 Scott, N. R. 287, 3 Man. & G. 597; *Ex parte* Littlejohn, 3 Mont., D. & De G. 182; *Ex parte* Hope, id. 720; Taylor *v.* Young, 3 B. & Ald. 521; *Ex parte* Hooper, 3 Deacon & Ch. 655; *Ex parte* Turpin, 1 id. 120; Lyde *v.* Mynn, 1 Mylne & K. 683. *In re* Willis, 19 Law J., Exch. 30; *In re* Foster, 19 Law J., C. P. 274. See 1 Cooke's Bankrupt Law, 190; Owen on Bankruptcy, 179; Stat. 12 & 13 Vict c. 106, §§ 77, 78; Act of Congress, 1841 § 5; Roosevelt *v.* Mark, 6 Johns. Ch 266.

(*g*) Van Sandau *v.* Crosbie, 3 B. & Ald. 13; Young *v.* Taylor, 2 J. B. Moore, 326, 8 Taunt. 315. It is said in 1 Cooke's Bankrupt Law, 210, that "the surety is held to have an equitable right to stand in the place of the original creditor, and receive dividends upon his proof." *Ex parte* Findon, Cooke, 170; *Ex parte* Brown, id. (cited in Owen on Bankruptcy, 180), Toussaint *v.* Martinnant, 2

the insolvency does not necessarily terminate the lease, unless it contain a provision to that effect, or the assignee declines assuming it. (*h*)

T. R. 100; Martin *v.* Brecknell, 2 M. & S. 39. It seems that in England, prior to the Statute of 49 Geo. 3, c. 121, § 8, the surety had no power to come in and prove his claim against the estate of his bankrupt principal, unless he had himself been called on to pay the debt before the bankruptcy. See Cooke's Bankrupt Law, above cited, and *passim;* Eden on Bankruptcy, 158, 177, and the cases cited above, of an earlier date than 1808. But the provision then enacted has been continued, with more or less of modification, to the present day, and may be considered part of the common law of bankruptcy in this country. *Ex parte* Young, in the matter of Slaney, 2 Rose, 40; Aflalo *v.* Fourdrinier, 6 Bing. 306; Wood *v.* Dodgson, 2 M. & S. 195. *Bayley*, J., in delivering his opinion said, with reference to this point: "The intention of the legislature, at the same time that they relieved the bankrupt was, to confer a benefit also on the surety or person who was liable for the debt of the bankrupt. The principal creditor might have proved under the commission, or might have resorted to the surety without proving under the commission; therefore, before the act he might have compelled the surety to pay the whole amount without the surety's having any benefit under the commission. This clause, therefore, was intended to remove that inconvenience, and to give to the surety the power of obtaining a dividend in respect of his debt." The Supreme Court of the United States, in the construction of the similar section of the late National Bankrupt Law, unhesitatingly adopted the same view. Mr. Justice *McLean*, delivering the opinion of the court, said: "Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it as surety, and that gave him a right to prove the claim under the fifth section. And the fourth section declares, that from all such demands the bankrupt shall be discharged. This is the whole case. It seems to be clear of doubt. The judgment of the State court is reversed." Mace *v.* Wells, 7 How. 272. The judgment of the Supreme Court of Vermont in this case will be found, Wells *v.* Mace, 17 Vt. 503. The view of the later English cases, and of the Supreme Court of the United States, will be found adopted in Morse *v.* Hovey, 1 Sandf. Ch. 187; Butcher *v.* Forman, 6 Hill, 583; Crafts *v.* Mott, 4 Comst. 603, decided as late as 1851; Dunn *v.* Sparks, 1 Carter, (Ind.), 397; and recognized in Holbrook *v.* Foss, 27 Maine, 441; Pike *v.* McDonald, 32 id. 418; Leighton *v.* Atkins, 35 id. 118. These were cases where the foundation of the plaintiff's claim was payment of certain *judgments* recovered against the defendants and their sureties (of which number were the plaintiffs), *after* the discharge of the defendants, which judgments, therefore, were *not* provable in bankruptcy. The distinction taken by the court, admitting the authority of Mace *v.* Wells, &c., was, as laid down by *Shepley*, J., in one of the cases, that the contract upon which a judgment at law has been recovered, is merged in and extinguished by the judgment, which constitutes a new debt, having its first existence at the time of its recovery. So that where a judgment had been recovered on a promissory note (27 Me 441), the note, by virtue of which it had been recovered, no longer continued to be a debt due from the defendant to the plaintiff. The judgment not being a debt due from the defendant at the time when his petition was filed, could not have been proved in bankruptcy against him. Comfort *v.* Eisenbeis, 11 Penn. St. 13. See further on this subject, Goddard *v.* Vanderheyden, 3 Wilson, 262, 2 W. Bl. 794; Young *v.* Hockley, 3 Wilson, 346; Taylor *v.* Mills, Cowp. 525; Paul *v.* Jones, 1 T. R. 599; Snaith *v.* Gale, 7 id. 364; Frost *v.* Carter, 1 Johns. Cas. 73; Buel *v.* Gordon, 6 Johns. 126; Lansing *v.* Prendergast, 9 id. 127; Mechanics and Farmers Bank *v.* Capron, 15 id. 467; Roosevelt *v.* Mark, 6 Johns. Ch. 266; Selfridge *v.* Gill, 4 Mass. 95; Page *v.* Bussell, 2 M & S. 551; Welsh *v.* Welsh, 4 id. 333 Haddon *v.* Chambers, 1 Yeates, 529; Deacon on Bankruptcy, 285, *et seq.;* Horn *v.* Nason, 23 Me. 101; Craggin *v.* Bailey id. 104; Farnham *v.* Gilman, 24 id. 250; Pollock *v.* Pratt, 2 Wash. C. C. 490. A case of great instruction, establishing the right of the surety to prove his contingent claim, is Crafts *v.* Motts, 5 Barb. 305; Morse *v.* Hovey, 1 Sandf. Ch. 187.

(*h*) McDougal *v.* Paton, 8 Taunt. 584; *Ex parte* Minet, 14 Ves. 189; Russell *v.*

None which rest upon an illegal or immoral contract or consideration can be proved. (*i*) And the assignees may not only make any defence of this kind which the insolvent could, as usury, but those which he could not, on the ground that he could not rest his defence on his own fraud; for the assignees defend for the benefit of the creditors, who are not in fault, and the insolvent has no interest. (*j*) It may be stated as a general rule, that debts cannot be proved which spring from an implied promise only, and not from a transfer or sale of property or a similar consideration. Nor a claim for merely unliquidated dam-

Doty, 4 Cowen, 576; Peters *v.* Newkirk, 6 id. 103; Hagard *v.* Raymond, 2 Johns. 478; *Ex parte* Descharms, 1 Atk. 103; Lansing *v.* Prendergast, 9 Johns. 127, and cases cited. In Stinemets *v.* Ainslie, 4 Denio, 573, the facts were, that on the 8th of April, 1842, the plaintiff demised to the defendant certain premises in the city of New York, for the term of one year from the first day of May then next, rent payable quarterly. Defendant entered and occupied the entire year, ending May 1, 1843. Under the agreement, plaintiff claimed to recover the last quarter's rent, from February first to May first, 1843. Defence, bankruptcy. Defendant's petition was filed December 12, 1842. On the 11th of March following, he was declared a bankrupt; and on the 7th of August thereafter, he was discharged. The court held, that the discharge was not a bar, and there was judgment for the plaintiff. On error brought, this judgment was affirmed. *Bronson*, C. J.: "The discharge only goes to such debts as the defendant owed at the time of presenting his petition, and the rent which the plaintiff seeks to recover accrued subsequent to that time. Although the agreement to pay rent was made prior to the bankruptcy, it is settled that the discharge does not bar an action on the agreement for rent accruing subsequent to the bankruptcy."

(*i*) *Ex parte* Cottrell, Cowp. 742. But where a bond was given for the payment of a sum of money by the bankrupt, in consideration that the obligee would marry a servant of the bankrupt, and maintain a bastard which the bankrupt had by her, and the marriage took effect, this was held not to be an illegal consideration, and the obligee was entitled to prove the bond. And in *Ex parte* Mumford, 15 Ves. 289, where promissory notes were given for liquidated damages in compromising an action for the seduction of the plaintiff's daughter, *per quod servitium amisit,* the notes were permitted to be proved under a commission against the maker. But where a bond is given, strictly *turpi causa,* or as *præmium pudoris* (for the distinction between an instrument of this character and those above alluded to, see Franco *v.* Bolton, 3 Ves. 368, and cases cited), it cannot be proved if the maker become bankrupt. Gilham *v.* Locke, 9 Ves. 614; *Ex parte* Ward, before Lord Camden, 1768, cited in 15 Ves. 290; Turner *v.* Vaughan, 2 Wilson, 340. So where the debt was void by reason of usury. Lowe *v.* Waller, Doug. 736; *Ex parte* Thompson, 1 Atk. 125; *Ex parte* Skip, 2 Ves. Sen. 489; Benfield *v.* Solomons, 9 id. 84; *Ex parte* Banglay, 1 Rose, 168. But it has been said, that where it is allowed, by the custom of the trade, for a commission to be taken in addition to legal interest, this, though sounding in usury, will yet be held not to prevent the proving of the bond. *Ex parte* Jones, 17 Ves. 332; Carstairs *v.* Stein, 4 M. & S. 192; Winch *v.* Fenn, 2 T. R. 52, note; *Ex parte* Henson, 1 Madd. 112; Deacon on Bankruptcy, 302, and cases cited. See other cases of illegal contracts, proof of which was refused, *Ex parte* Moggride, 1 Cooke's Bank. L. 185; *Ex parte* Daniels, 14 Ves. 191; *Ex parte* Bell, 1 Maule & S. 751; *Ex parte* Dyster, 2 Rose, 256; *Ex parte* Schmaling, Buck, 93; *Ex parte* Boussmaker, 13 Ves. 71.

(*j*) This subject is considered in the cases cited *ante*, on the assignee's right over goods fraudulently conveyed, sect. 8, n. (*i*), and on the right and liability of the assignees to the same equity as the bankrupt himself, sect. 6, n. (*v*).

ages; for the amount should, generally at least, be ascertainable without the intervention of a jury (*k*) And this brings us again to the great distinction between claims for tort, and those founded on contract. As a general rule, as has been said, no claims for tort are ever provable. Certainly not those for bodily injury, as for assault and battery; nor for slander or libel. But as we go further, there seems to be some uncertainty. Thus, a claim sounding in contract, but recoverable only as damages; as that of one who had contracted to buy of another what that other failed to make title to, and by that failure gave the proposed buyer a claim for damages, which claim and action do not pass to the assignee. But while a vendee has generally no provable claim on his right of action for non-delivery, yet if he has paid the price, he has, it is said, a definite claim for so much money, which he may prove. (*l*)

(*k*) Green *v.* Bucknell, 8 A. & E. 701. This was an action of assumpsit on a special contract, that whereas, by such contract between B. and G., G. had agreed to sell to B. all the oil which should arrive by a certain ship which B. was to receive, within fourteen days after the landing of the cargo, and pay for at the expiration of that time by bills or money at a specified price per ton, with customary allowance. The declaration set forth that the ship arrived, and the cargo was landed, and G. tendered the oil to B. at the end of the fourteen days; that the quantity of oil after allowances, &c., was a certain number of tons; that at the time of the tender the market price of oil was lower than the contract price by an amount stated; that B., on the tender being made, refused to accept, and that the difference of prices was within the knowledge of the parties. On this state of facts it was held, that B. having become bankrupt after the refusal, G. could not prove for this breach of contract, under the commission; for, that although G.'s claim would be measured by the difference between the contract and the market prices at the time when B. should have fulfilled his contract; yet the case did not show that the data on which the calculation must proceed, were so settled as to admit of no dispute, and render the intervention of a jury unnecessary; so that G.'s claim was not a debt but for damages, and could not be proved. Goodtitle *v.* North, Doug. 584. In this case, Lord *Mansfield* said: "The *form* of the action is decisive. The plaintiff goes for the whole damages occasioned by the tort, and when damages are uncertain, they cannot be proved under a commission of bankruptcy." This was an action for trespass for mesne profits. Parker *v.* Norton, 6 T. R. 695; Parker *v.* Crole, 5 Bing. 63, 2 Moore & P. 150, Shoemaker *v.* Keely, 2 Dall. 213, 1 Yeates, 245; Williamson *v.* Dickens, 5 Ired. 259; Comstock *v.* Grout, 17 Vt. 512; Overseers of St. Martin *v.* Warren, 1 B. & Ald. 491; Whitmarsh's Bankrupt Law, p. 266; Hammond *v.* Toulmin, 7 T. R. 612; Johnson *v.* Spiller, *Buller*, J., note to Alsop *v.* Price, 1 Doug. 168; Tayor *v.* Young, 3 B. & Ald. 521; Utterson *v.* Vernon, 3 T. R. 539, 4 id. 570. See Boorman *v.* Nash, 9 B. & C. 145; *Ex parte* Day, 7 Ves. 301; *Ex parte* King, 8 id. 334; Forster *v.* Surtees, 12 East, 605; De Tastet *v.* Sharpe, 3 Madd. 51; Gulliver *v.* Drinkwater, 2 T. R. 261. A claim for damages for a trespass is not provable. Kellogg *v.* Schuyler, 2 Denio, 73.

(*l*) Utterson *v.* Vernon, 3 T. R. 539; Parker *v.* Norton, 6 id. 695, are cases of this class. There seems no inconsistency in these classes of cases. The same principle governs both. If the claim sounds *merely* in damages it cannot be proved, for damages, strictly speaking, are for the

The claim must rest on a valuable consideration. For the assignee may defend against a merely good consideration, although the insolvent himself might not. (*m*) Of course the assignee may defeat any claim which the insolvent himself might, as where it is barred by a statute of limitation or the statute of frauds, or the like. (*n*) The question of time also comes in here. For no debt is provable against the funds, that is, against the creditors, which did not accrue before the bankruptcy. The reason of the case is obviously this. Up to a certain point of time all the property previously coming to the insolvent, and all the debts previously due to him pass to the assignee, for the benefit of certain creditors; and these must be creditors whose claims against the insolvent accrued to them

jury to determine. But if, though nominally sounding in damages, as is the allegation in every ordinary action of assumpsit, the claim be in substance for a distinct and liquidated sum, it may be proved in bankruptcy. *Ashurst*, J., in delivering his opinion in Hammond *v.* Toulmin, said: "I have always understood that when the plaintiff's demand rested in damages, and could not be ascertained without the intervention of a jury, it could not be proved under the defendant's commission; now here was *no precise sum* due to the plaintiffs at the time of the defendant's bankruptcy." Such was the view of the Court of Appeals in New York in a recent case, where it was held, that a claim for liquidated damages for the breach of an agreement might be proved in bankruptcy. Boyd *v.* Vanderkemp, 1 Barb. Ch. 274. And on the same principle, a claim against a common carrier for goods lost. Campbell *v.* Perkins, 4 Seld. 430. As to the effect of a judgment recovered for a tort previously to the bankruptcy, see *infra*.

(*m*) Gardiner *v.* Shannon, 2 Sch. & L. 228. Gardiner, in 1799, entered into copartnership with H., and previous to the execution of the partnership articles, executed to the defendant a bond in £1,000, conditioned to pay £500 on a day since passed. A deed of the same date was executed between Gardiner and Shannon, reciting the marriage of Gardiner, and that he had made no settlement on his wife previous to the marriage; also reciting the bond, and that Gardiner was about to enter into said copartnership — declaring the trust of the bond to be that the wife should receive the interest of the said sum of £500 from the death, failure in trade, or bankruptcy of Gardiner, and that in such case she should have power of appointment, &c. A commission in bankruptcy soon issued against Gardiner and H., under which defendant proved the bond; a dividend was ordered, but the order for payment being resisted by the partnership creditors, a bill was filed impeaching the bond as voluntary, and the Lord Chancellor (*Redesdale*) said: "This is a mere voluntary bond; an act which the bankrupt was not under an obligation to do; and when a man does such an act it must be taken to have been done in order to deprive his creditors of the remedy they would otherwise have against his effects. . . . Suppose that Gardiner, instead of becoming a trader, had died, could his executors have paid this as against his creditors? Though it might be recovered at law, it would be postponed in equity as a voluntary bond. [See Jones *v.* Powell, 1 Eq. Cas. Abr. 84; Lechmere *v.* Carlisle, 3 P. Wms. 222. The Lady Cox's case, id. 341.] The proper order to make, in case of a voluntary bond, is not to expunge it; but that it shall not be set against the creditors; but if there be a surplus after payment of all joint and separate debts, the party shall be allowed to come in."

(*n*) *Ex parte* Dewdney, 15 Ves. 479; *Ex parte* Seaman, id.; *Ex parte* Roffey, 2 Rose, 245.

before the same point of time. If, on the one hand, a debtor to the insolvent, who became his debtor after a certain moment, must pay to him, and not to the assignee, so on the other, one becoming his creditor after the same time, must look to him for payment, and not to the assignee.

Interest is always cast on debts in this country; and substantially so in England, at present, although different rules have prevailed. (*o*) To put all the creditors on an equality, interest is cast to the time of the decree, on all debts due from the insolvent and payable before that time, and is discounted from all those payable at a later period. If a debt is payable on demand, and only on demand, — as by a note on demand, for example, — the insolvency itself acts as a demand to sustain the claim; but if there had been no previous demand, interest would not generally be allowed. After the amounts are made up to

(*o*) In England, the doctrine on this subject formerly was, that the debt must have *accrued before the act of bankruptcy* in order to enable the creditor to prove it. Bamford *v.* Burrell, 2 B. & P. 1; O'Brien *v.* Greirson, 2 Ball & B. 334. Subsequently the provision of the statute 46 Geo. 3, c. 135, s. 2, which was incorporated into the 6 Geo. 4, c. 98, s. 47, and which is substantially reënacted in 12 & 13 Vict. c. 106, s. 165, *et seq.*, allowed any person, with whom the bankrupt shall have really and *bona fide* contracted any debt or demand before the issuing of the commission, to come in, notwithstanding any prior act of bankruptcy committed by the bankrupt, and prove the same, provided he had not, at the time it was contracted, *notice* of such act of bankruptcy. It has been held, that the act of bankruptcy meant in this section, is the act of bankruptcy *on which the commission issues.* So that if the debt is contracted before the act of bankruptcy on which the commission is issued, though after notice of prior act of bankruptcy, it may nevertheless be proved under the commission. *Ex parte* Bowness, 2 Maule & S. 479; *Ex parte* Sharpe, 3 Mont., D. & De G. 490; *Ex parte* Birkett, 2 Rose, 71. In Brown *v.* Lamb, 6 Met. 203, the rules on this subject were laid down comprehensively, as follows: that "On all debts where interest is reserved by the contract, interest is to be paid according to the contract. On all debts where interest is not recovered by the contract, if the debt became due before the first publication of the warrant to the messenger, interest is to be paid from the time of such publication; but if the debt become due after such publication, interest is to be paid from the maturity of the debt; and if the debt were payable on demand, then interest is to be paid from the time of the earliest demand shown; and if no special demand be shown, then interest is to be paid from the time of such first publication. And when an appeal is taken from an order of a master directing interest to be so paid, and that order is confirmed, the interest is to be paid up to the time of the final order of the appellate court." This rule is founded on the Massachusetts statute of 1838, and it will be seen that questions of interest are governed, to a greater extent than many questions in bankruptcy, by the express statute provisions. The general principles, however, are laid down in Broomley *v.* Goodere, 1 Atk. 75; *Ex parte* Koch, 1 Ves. & B. 342; Eden on Bankruptcy, 391; Archbold on Bankruptcy, tit. Interest, and cases cited there. Eyre *v.* Bank of England, 1 Bligh, 582; *Ex parte* Greenway, Buck, 412; *Ex parte* Martin, 1 Rose, 87; Deacon on Bankruptcy, 263, 269, *et seq.*; Bower *v.* Marris, Craig & Ph. 251; *Ex parte* Higginbottom, 2 Glyn & J. 123. The instructive opinion of *Hubbard*, J., in Brown *v.* Lamb, above cited; *Ex parte* Williams, 1 Rose, 399; *Ex parte* Champion, 3 Bro. C. C 436, and cases cited.

the time of the decree, interest is cast on none; for if it were cast on all, it would come to the same thing. If any creditors hold security, the statutes usually provide for their surrendering it to the assignees if they please, or retaining it and not proving their debts, or realizing it, or having it valued, and thus ascertaining the balance of debt due to them, and proving that. (*p*)

If any persons, creditors of course, have attached the property of the insolvent, the attachment is dissolved at once by the insolvency. (*q*) But in some States the assignee has power to

(*p*) In the matter of Grant, 5 Law Rep. 303, this point came before *Story*, J. The American Bank held certain collateral securities which they desired to apply to the amount of their debt, so far as they would go, and prove against Grant's estate for the balance. The court said: "What is to be done in cases where a creditor who proves a debt holds collateral security therefor? Are these securities in all cases to be sold, and the creditor to be permitted to prove for the residue of his debts? Or may the creditor, under the direction and sanction of the court, be permitted to take the securities at their true value, that value being ascertained under the direction of the court, and to prove for the residue of his debt? Upon these questions I do not profess to feel any real difficulty. . . . There can be no doubt that a creditor, holding securities, is enabled to prove his debt upon his offer to surrender, and actually surrendering those securities to be disposed of according to the order and direction of the court, and that he is entitled to prove his debt, deducting the true value of the securities therefrom, that true value, when ascertained, being paid or applied by the court for the exclusive benefit of such creditor. How, then, is such value to be ascertained by the court? Must it be ascertained by a sale of the securities by the court in all cases? Or may it be ascertained by an appraisement, or by allowing the creditor to take the same at the nominal value, or in any other manner which the court may deem for the true interest and benefit of all concerned in the estate, if there be no objection by the bankrupt, or any of the other creditors, or any other party in interest; or, in case of objection, if, upon full notice and hearing of all parties, the court, in the exercise of a sound discretion, deem the one or the other course most for the benefit of all concerned in the estate?" It was held, that the court might, in the exercise of a sound discretion, adopt either of these courses, and, at all events, that the full value of the securities shall be secured to the creditor Amory *v.* Francis, 16 Mass. 308; Lanckton *v.* Wolcott, 6 Met. 305. It seems that in England the usage has been for the court to direct a sale, and the creditor was allowed to hold the amount realized therefrom, and prove for the residue. Eden on Bankruptcy, 104, *et seq.*; Deacon on Bankruptcy, 178; *Ex parte* Goodman, 3 Madd. 373; *Ex parte* Parr, 1 Rose, 76, 18 Ves. 65; *Ex parte* Bennet, 2 Atk. 527; *Ex parte* Wildman, 1 id. 109; *Ex parte* De Tasted, 1 Rose, 323, declare the doctrine, that where the creditor holds the security of a third person merely, or the joint security of the bankrupt and a third person, the creditor may prove for the whole amount, and retain his security at the same time, to recover what he can upon it, provided that he receives in the whole no more than twenty shillings to the pound. *Ex parte* Hedderley, 2 Mont., D. & De G. 487; *Ex parte* Shepherd, id. 204. See also, *Ex parte* Prescott, 4 Deacon & Ch. 23; *Ex parte* Dickson, 2 Mont. & A. 99; *Ex parte* Rufford, 1 Glyn & J. 41; Ward *v.* Dalton, 7 C. B. 643. But it was held, as above, that securities from the bankrupt alone must be given up before proof. *Ex parte* Bloxham, 6 Ves. 449, 600; *Ex parte* Barclay, 1 Glyn & J. 272; *Ex parte* Smith, 3 Bro. C. C. 46; *Ex parte* Dickson, 2 Mont. & A. 99. See also, on the same point, *Ex parte* Baker, 8 Law R. 461, and Eastman *v.* Foster, 8 Met. 19.

(*q*) And it has been held, that where a statute provided that an assignment in insolvency should operate a dissolution of all attachments on the property, this should apply to an attachment made on the prop-

continue the attachment and the suit for the benefit of the creditors. (r) As, for example, where a dissolution of the first

erty after the statute went into operation, for the purpose of securing a debt incurred before its enactment, the debtor and creditor being citizens of the State where the assignment was made, and the cause of action having accrued on a contract to be performed in this State, on the ground that such a provision affects not the right, but the remedy. Bigelow *v.* Pritchard, 21 Pick. 169. But not an attachment made before the passage of the act. Kilborn *v.* Lyman, 6 Met. 299. This matter is further considered in another part of this chapter, in connection with the topic of liens.

(r) In this connection, it may be proper to allude to the second section of the National Bankrupt Act of 1841, which provided that it should in nowise impair "any *liens*, mortgages, or other securities on property, real or personal, which might be valid by the laws respectively." A diversity of opinion had existed in the various State courts as to what constituted a lien. That a judgment was properly a lien seems to have been generally admitted by the courts. In the matter of Cook, 2 Story, 380, Judge *Story* said: "I have never doubted that the lien of a judgment at the common law upon real estate since the statute of Westminster, 13 Edw. I. Stat. 1, c. 18, which has been adopted in many States of the Union, is within the proviso of the second section of the Bankrupt Act of 1841, and sacred thereby, and is wholly unaffected by the proceedings in bankruptcy, where it has been obtained in the regular course, before any petition or decree or discharge in bankruptcy." This view is adopted in Buckingham *v.* McLean, 13 How. 151; Pollard *v.* Cocke, 19 Ala. 188; Talbert *v.* Melton, 9 Smedes & M. 9; Byers *v.* Fowler, 7 Eng. 218; Towner *v.* Wells, 8 Ohio, 136; Roads *v.* Symmes, 1 id. 140; Mut. Ass. Soc. *v.* Stanard, 4 Munf. 539; Coutts *v.* Walker, 2 Leigh, 268; Moliere *v.* Noe, 4 Dall. 450; Codwise *v.* Gelston, 10 Johns. 507; Kerper *v.* Hoch, 1 Watts, 9; Cathcart *v.* Potterfield, 5 id. 163; Porter *v.* Cocke, Peck, 130; United States *v.* Morrison, 4 Pet. 124; Conard *v.* Atlantic Ins. Co. 1 id. 386; Ridge *v.* Prather, 1 Blackf. 401; Van Rensselaer *v.* Sheriff of Albany, 1 Cowen, 501. Some courts have even said, that an action commenced operates a lien. Nowdigail *v.* Lee, 9 Dana, 17; Watson *v.* Wilson, 2 id. 406; Robertson *v.* Stewart, 2 B. Mon. 321; Hodges *v.* Holeman, 1 Dana, 50. See Storm *v.* Waddell, 2 Sandf. Ch. 494. In other States an attachment has been considered a lien. Carter *v.* Champion, 8 Conn. 549; Dunklee *v.* Fales, 5 N. H. 528; Kittredge *v.* Bellows, 7 id. 427; Wheeler *v.* Fish, 3 Fairf. 241; Robinson *v.* Mansfield, 13 Pick. 139; Pomroy *v.* Kingsley, 1 Tyler, 294; Fettyplace *v.* Dutch, 13 Pick. 392; Arnold *v.* Brown, 24 id. 95; Grosvenor *v.* Gold, 9 Mass. 210. But *Story*, J., denied that an attachment was now a lien, within the meaning of the bankrupt law, even in those States which had always treated it as such. *Ex parte* Foster, 2 Story, 132, 5 Law Reporter, 55. This case was cited and considered in Kittredge *v.* Warren, 14 N. H. 509, and an opposite opinion on this point was reached by the court. It was held, that an attachment of property upon mesne process, *bonâ fide* made before any act of bankruptcy, was a lien or security upon property, valid by the laws of New Hampshire, and within the proviso of the second section of the Bankrupt Act. In the matter of Bellows & Peck, 7 Law Reporter, 119, this matter came again before the Circuit Court, Judge *Story* presiding, and the authorities, and especially Kittredge *v.* Warren, were considered at length. The opinion of the court in *Ex parte* Foster was reaffirmed; and going further, it was held, that where an attachment on mesne process was made and the defendant subsequently obtained his discharge in bankruptcy, and a State court where the case was pending should, as in Kittredge *v.* Warren, hold that the attachment prevailed as against the subsequent proceedings, and the discharge invalid, as against creditors who had secured their rights by such attachment, it would be the duty of the District Court to grant an injunction against the creditor, his agent and attorneys, and the sheriff who had charge of the property attached, to restrain the creditor from proceeding to judgment, or if the suit had been prosecuted to judgment, to restrain him from levying his execution on the property attached, or if the property had been sold under the execution, to compel the sheriff to bring the money into court. In Kittredge *v.* Emerson, 15 N. H. 227,

attachment would leave the property under a second attachment, made by a citizen of another State, and such as the insolvency would not discharge or control. (*s*)

The law of set-off, in insolvency, to which we have already alluded, is a little peculiar. It is indeed far wider in its reach than the common law, or statutory provisions for set-off not in insolvency. It covers all mutual claims or debts of every kind. A creditor of the insolvent, who is also his debtor in any way, gets the whole benefit of all his debt to the insolvent. If he paid it in money, this would go to the fund. But he may pay it by set-off; and if this equals or exceeds his debt to the insolvent, his whole debt is paid. (*t*) But an administrator has not

which came before the court of New Hampshire subsequent to the decision in Bellows & Peck, the doctrines of that case were assailed, and that of Kittredge *v.* Warren affirmed with conspicuous ability, by Mr. Chief Justice *Parker*, in an opinion of great length, in which the cases are reviewed, both with regard to the matter of attachment, and the power of the courts of the United States to grant injunctions to restrain plaintiffs in the State courts from pursuing their rights and remedies in those tribunals. And denying this power, in order to be clearly understood, the court say, that if such plaintiffs shall ask their interference, it will be their duty to enjoin and prohibit any person from attempting to procure any process, from any court not acting under the authority of the State of New Hampshire, with a view to prevent the entry of judgments in such suits, or to prevent the execution of the final process issued upon those judgments, where obtained. This matter is considered also by *Prentiss*, J., in the District Court of Vermont. Downer *v.* Brackett, 5 Law Reporter, 392, where a view is adopted like that of the court of New Hampshire, above cited. Haughton *v.* Eustis, 5 Law R. 505. The case of Bellows & Peck was taken to the Supreme Court of the United States on writ of error, and the decision of *Parker*, C. J., sustained. Peck *v.* Jenness, 7 How. 612. The view adopted by Mr. Justice *Story* was concurred in by *Conckling*, J., in the matter of Allen, 5 Law Reporter, 362. The following cases seem to sustain the view adopted by *Parker*, C. J.; Trzell *v.* Rountree 1 McLean, 95, 7 Pet. 464; Wallace *v.* McConnell, 13 Pet. 151; Beaston *v.* Farmers Bank of Delaware, 12 Pet. 128; Savage *v.* Best, 3 How. 111; Colby *v.* Ledden, id. 626; Shawhan *v.* Wherritt, id. 627; Downer *v.* Brackett, 21 Vt. 599; Shaffer *v.* McMakin, 1 Smith (Ind.), 148, 1 Carter, 274; Langford *v.* Raiford, 20 Ala. 532; Kilborn *v.* Lyman, 6 Met. 299; Hubbard *v.* Hamilton Bank, 7 Met. 340; Davenport *v.* Tilton, 10 Met. 320.

(*s*) Thus in the Massachusetts Act of 1841, c. 124, s. 5, it was provided, that, "Should it appear to the Judge of Probate or Master in Chancery, that a dissolution of any attachment pursuant to the provisions of the fifth section of the act to which this is an addition (1838, c. 163), would prevent said attached property from passing to the assignees, the attachment upon his order shall survive, notwithstanding the provisions of such section, and the assignee shall have power, with the permission of the court to which such writ is returnable, to proceed with the suit against the insolvent to final judgment and execution, and the amount recovered, exclusive of costs, shall vest in the assignees."

(*t*) In addition to our remarks and citations on the law of set-off in note (*g*), to section 8, p. 483, we would say, that in Gibson *v.* Bell, 1 Bing. N. C. 743, *Tindal*, C. J., set forth with accuracy the progress of the English law on this subject. See p. 753, *et seq.*; Bolland *v.* Narb, 8 B. & C. 105; *Ex parte* Deeze, 1 Atk. 228; *Ex parte* Prescot, id. 230; Boyd *v.* Mangles, 16 M. & W. 337. The credits, it is said, must have been given before

been permitted to set off a debt due to him in his own right against a claim by the assignee of a distributive share belonging to the insolvent. (*u*)

A verdict in favor of a creditor, which might be decisive against the insolvent himself, is not necessarily so against an assignee. Any other creditor may, for good reason, ask that the verdict be inquired into and impeached; and the assignee not only may, but must do this, if he can, supposing sufficient reason to be shown. (*v*)

A judgment is stronger than a verdict. It is indeed the highest evidence of debt; and as between the parties, it is conclusive at common law. But it is not conclusive in insolvency. Courts have declared that proof of a debt is not made out by

the bankruptcy. Herrison *v.* Guthrie, 3 Scott, 298; Russell *v.* Bell, 1 Dowl. N. S. 107; Hulme *v.* Miggleston, 3 M. & W. 30; Young *v.* Bank of Bengal, 1 Deacon, 622; *Ex parte* Hale, 3 Ves. 304. In order to come within the purview of the doctrine, the debts to be set-off must be due in the same right. Groom *v.* Mealey, 2 Bing. N. C. 138; Staniforth *v.* Fellowes, 1 Marsh. 184; Yates *v.* Sherrington, 11 M. & W. 42, 12 M. & W. 855; Belcher *v.* Lloyd, 10 Bing. 310; Forster *v.* Wilson, 12 M. & W. 191; Clarke *v.* Fell, 1 Nev. & M. 244; French *v.* Andrade, 6 T. R. 582; Cherry *v.* Boultbee, 4 Mylne & C. 442; West *v.* Pryce, 2 Bing. 455; *Ex parte* Pearce, 2 Mont., D. & De G. 142; *Ex parte* Blagden, 2 Rose, 249; Addis *v.* Knight, 2 Meriv. 117; *Ex parte* Ross, Buck, 125; Fair *v.* M'Iver, 16 East, 130; Slipper *v.* Stidstone, 5 T. R. 493. The credits must be such as will in their nature terminate in debts; Rose *v.* Hart, above cited, 2 Smith, L. C. 179; Rose *v.* Sims, 1 B. & Ad. 521; Russell *v.* Bell, 1 Dowl. N. S. 107; Abbott *v.* Hicks, 7 Scott, 715; Groom *v.* West, 8 A. & E. 758; Tamplin *v.* Diggins, 2 Camp. 312; Ridout *v.* Brough, Cowp. 133. So it has been said that if a banker receives and pays money on account of a bankrupt, after notice of his bankruptcy, he cannot set off the payments against the receipts, as against the assignees. Vernon *v.* Hankey, 2 T. R. 113, 3 Bro. 313; in Raphael *v.* Birdwood, 5 Price, 593; Atkinson *v.* Elliott, 7 T. R. 378; *Ex parte* Boyle, Cooke's Bank, L. 571 (8th ed.), and in this last case, it was held, that if a bankrupt be indebted to a creditor in two sums, for one of which the creditor may prove, for the other not, and the creditor be indebted to the bankrupt, he may set off his debt against the debt he cannot prove, and prove for the other. See cases cited, *ante*, sect. 8, note (*y*), p. 483.

(*u*) Davis *v.* Newton, 6 Met. 537. The same principle was applied in this case as in the cases cited in the preceding note, to the point, that in order to give the right to set-off, the debts must be due in the same right.

(*v*) *Ex parte* Rashleigh, *Ex parte* Butterfill, 1 Rose, 192. In this case it was attempted by counsel to show that the commissioners were bound by a verdict rendered. Lord Chancellor *Eldon* said: "I am quite clear that the commissioners are not bound by the verdict, if circumstances present themselves in a credible shape, leading them to doubt the propriety of it; and the judgment, after the commission is just nothing at all. Their jurisdiction, like the Chancellor's, is both legal and equitable, and if there are equitable grounds, upon which the verdict cannot stand, they are not only authorized, but it is their duty to inquire into them, and the verdict will not conclude either the bankrupt or the creditors. It is competent to any creditor of the bankrupt, or to the bankrupt himself, to impeach the verdict, which, before it is matured into a judgment or execution, is only *prima facie* evidence of a debt." Deacon on Bankruptcy, 197.

suit, verdict, and judgment, however formal and accurate, if the court can see clearly, by means of competent evidence, that the debt itself is not actually due to the creditor in good faith. (*w*) The court or commissioner may certainly inquire into the consideration of a judgment debt.

A judgment may have the effect of making a claim provable, which of itself would not lie. Thus, if one brought his action even for assault, or slander, no claims for which would, as we have seen, be provable, and his action ripens to judgment before the insolvency, there is no more reason why he may not prove this judgment debt, than why he should not prove a promissory note given for the same cause. (*x*) A mere award of referees does not change the nature of the claim. (*y*)

SECTION XII.

OF THE PROOFS OF DEBTS, AND OF DIVIDENDS.

Under this head we may consider first, who may prove debts, and against whom they may be proved; and second, the manner of proof.

All persons who have distinct claims against the insolvent, may prove them against his estate, whatever be their personal

(*w*) "Proof upon a judgment will not stand merely upon that, if there is not a debt due in 'truth and reality,' for which the consideration must be looked to." Lord *Eldon*, in *Ex parte* Bryant, 1 Ves. & B. 211. "The commissioners clearly may inquire into the consideration for a judgment debt." *Ex parte* Marson, 3 Mont. & A. 155. And it has been held that a judgment, to be provable, must have been signed, actually, or by relation, before the commission issued. Moggridge *v.* Davis, Wightw. 16; Buss *v.* Gilbert, 2 M. & S. 70; Robinson *v.* Vale, 2 B. & C. 762; *Ex parte* Birch, 4 id. 880.

(*x*) This matter has been already commented upon, with reference to the right to prove claims for unliquidated damages, which see. The reason of the doctrine of the text is obvious. The claim, while in its unliquidated state, is for no *distinct sum*, as soon as the jury have passed upon it, it becomes a claim for a *definite amount*. The question then comes, as in the case of a promissory note, is the claim, taken as a whole, valid? No question of greater or less amount of damages is left for a jury. That the *judgment* changes the character of the demand from what may be termed a mere claim to a *debt*, see Crouch *v.* Gridley, 6 Hill, 250; see also, Thompson *v.* Hewitt, id. 254. So with a decree of a court of chancery for the payment of a debt. Johnson *v.* Fitzhugh, 3 Barb. Ch. 360.

(*y*) In the matter of Comstock, 5 Law Rep. 163.

relations to him. Thus, a wife, who has a distinct estate of her own, may have and prove a debt due to her from the estate of her hubsand. (z) A trustee may prove for his *cestui que trust.* (a) An infant may prove by his guardian; and courts having cognizance of bankruptcy matters, may generally appoint a guardian for the purpose. The assignee of a bond or simple contract may prove in his own name. The assignee of another insolvent may prove his claim. Corporations may prove by their duly authorized attorney. (b) In all these cases, as indeed in all cases, precautions are used to ascertain the truth, which may best be considered under the next topic, the method of proof.

In all cases, the other creditors are entitled to the oath of the party in interest, and to the benefit and protection derivable from his examination; and either of them may have any question of this kind determined by a jury. (c) The provisions for this

(z) Thus it is said, that if a bond or covenant is given by the husband, to pay the wife, or her trustees, during his life, a sum of money for the benefit of the wife or issue after his death, such a bond may be proved in bankruptcy against his estate. *Ex parte* Winchester, 1 Atk. 116; *Ex parte* Dicken, Buck, 115; *Ex parte* Campbell, 16 Ves. 244; *Ex parte* Gardner, 11 id. 40; *Ex parte* Brown, Cooke, 231; *Ex parte* Granger, 10 Ves. 349; Montefiori *v.* Montefiori, 1 W. Bl. 363; Shaw *v.* Jakeman, 4 East, 201. See also, *Ex parte* Smith, Cooke, 237; Brandon *v.* Brandon, 2 Wils. Ch. 14; *Ex parte* Elder, 2 Madd. 282; *Ex parte* Brenchley, 2 Glyn & J. 174. But it is said that a bond given by the husband to pay money for the use of the wife, with a condition, by way of defeasance, that the bond shall not be enforced unless upon the bankruptcy of the obligor, will be void as a fraud upon the creditors of the husband, and cannot be proved against his estate. Lockyer *v.* Savage, 2 Stra. 947; Higinbotham *v.* Holme, 19 Ves. 88; Stratton *v.* Hale, 2 Bro. Ch. 490, s. c. Buck, 179; *Ex parte* Hodgson, 19 Ves. 206; *Ex parte* Young, 3 Madd. 124; *Ex parte* Hill, Cooke, 232; *Ex parte* Bennett, id. 233.

(a) *Ex parte* Dubois, 1 Cox, 310. As to the joinder of *cestui que trust* in the proof, see *infra.*

(b) This is provided for by statute, and it may be added, that all these matters of form in proof, &c., are made the subject of strict statute regulation. In Albany Exchange Bank *v.* Johnson, 5 Law Rep. 313, *Conckling*, J., said, after stating that the statute requirement must be fully complied with: "Indeed, independently of the above recited provision of the act, it may well be doubted whether a petition of this nature, in behalf of a corporation, could properly be received without proof that the persons by whom it was signed and verified were, in fact, the official organs or the authorized agents of the corporation." 1 Cooke, Bankrupt Law, 124; Deacon on Bankruptcy, 194; *Ex parte* Bank of England, 18 Ves. 228, 1 Rose, 142, which last report seems to be somewhat deficient. *Ex parte* Bank of England, 1 Wils. Ch. 295, 1 Swanst. 10.

(c) In the case of Foster *v.* Remick, 5 Law Rep. 406, which arose under the late National Bankrupt Act, *Story*, J., said: "And after having provided 'that all proof of debts or other claims of creditors entitled to prove the same by this act, shall be under oath or solemn affirmation, &c.,' [the statute] proceeds to declare, 'but all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction in bankruptcy, and as well the assignee as the creditor, shall have a right to a trial by jury, upon

purpose differ considerably, both in the statutes and in the practice of the different States. Generally, however, there must be, in most of the cases mentioned above, the oath of the party represented and actually interested, as well as of him who has the legal interest and acts as owner. Thus, the *cestui que trust* should join with the trustee, (*d*) the infant with the guardian; and some officer of a corporation should present the claim of the corporation, who was so conversant of its business as to be able to testify concerning it. So, too, if an assignee proves a debt, his insolvent should be sworn. (*e*) The general reason for all this is, that the creditors may have all the assurance they can from the oaths of those actually interested, that the whole amount claimed is due, and that no part has been paid, or allowed for, or in any manner settled or met by a counter-claim which should reduce it. The reason of the rule shows

an issue to be directed by such court to ascertain the validity and amount of such debt or claims.' Now, certainly, there is some difficulty in avoiding the conclusion, that this clause of the seventh section does apply to every case, where the creditor seeks to have the fact ascertained by a jury, of the validity and amount of his claim, whatever may be the case of the debtor, where no assignee has, as yet, been appointed. It strikes me, therefore, that if the creditors in the present case should desire a trial by jury, it ought to be granted; but if not desired, then the court may proceed to decide the case of itself, as a summary proceeding in equity."

(*d*) In *Ex parte* Dubois, 1 Cox, 310, the language of the Lord Chancellor was: "The reason why a trustee was not permitted to prove the debt alone under the commission is, that he must swear to the debt being due to him; now the debt being only due to him *in trust* for another, it is rather too great a refinement for him to take such an oath; and if he swear the debt is due to him as trustee only, that is not sufficient, for it does not appear with certainty that the debt has not been paid to the *cestui que trust*. The *cestui que trust* must, therefore, join the trustee in swearing that no part of the debt has been paid or secured." And it seems that the same reason will apply to the case of proof by a guardian, provided, of course, that he could have a knowledge of the existence of his debt. *Ex parte* Belton, 1 Atk. 251. So, if *cestui que trust* be a lunatic, his oath will not, as matter of course, be required. *Ex parte* Maltby, in the matter of Simmons, 1 Rose, 387.

(*e*) Owen on Bankruptcy, 195, Cooke, 153. It has already appeared, that the right of the assignees to sue on debts due the bankrupt's estate, with or without naming themselves assignees, depends upon the time of accrual of the debt or right of action. In certain cases (see *ante*) the assignees may treat the debt as due themselves, and make no allegation in their declaration of the fact, that they are assignees of such an insolvent. Now, in cases where they may sue, if the debtor against whom they hold the claim is solvent, it seems that it might well be held in case of the insolvency of the debtor, that they can prove against his estate, without the necessity of the oath of the creditor himself. This is a matter now within their personal knowledge. Otherwise, when the debt accrued at such a time that they could have no such knowledge. In practice, the oath of the creditor himself is usually taken in both classes of cases, and there is certainly nothing objectionable in this mode of procedure. But it is submitted, that the validity of the proceeding, when the oath of the creditor has not been taken, in cases of the class above alluded to, might well be maintained, notwithstanding the omission.

its limit. If the party represented can know nothing of this, as an actual infant, or an insane person, his oath is not called for. (*f*)

In all of these matters, commissioners and courts have considerable discretion. The examination is usually rigorous and searching if there be any reason to suppose fraud or collusion. And beside the oath of the creditor, which would not be received at common law, and of the insolvent which would be receivable, all kinds of evidence, admissible at law, may be offered on the one side, or demanded on the other, in order to submit every claim to thorough and effectual investigation. (*g*)

(*f*) *Ex parte* Lloyd, In the matter of Lloyd, 1 Rose, 4; Fortescue *v.* Hennah, 19 Ves. 67; *Ex parte* Symes, 11 Ves. 521.

(*g*) And moreover, as to debts due, and the disposition of the property, the bankrupt may be examined in accordance with the principles of equity jurisprudence. But the court will guard him against answering any questions which shall tend to render him liable to a criminal prosecution, unless the disclosure is absolutely essential to the interests of the creditors. Archbold on Bankruptcy, 277; *Ex parte* Cossens, in the matter of Worrall, Buck, 531. This rule may, however, require some qualification; for, in the case above cited, it is said by Lord Chancellor *Eldon:* "I conceive that there is no doubt that it is one of the most sacred principles in the law of this country, that no man can be called on to criminate himself, if he choose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to show he has property which he has not got according to law; as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do according to the act of parliament, except under the limitation of the late act; and the case of persons having the possession of gun powder in unlicensed places, whereby they become liable to great penalties, whether the crown takes advantage of the forfeitures or not: in all these cases the parties are bound to tell their assignees, by the examination of the commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors." And in *Ex parte* Oliver, 1 Rose, 407, seven years before the case in Buck was decided, it was held by Lord *Eldon*, that the court had power to punish a bankrupt for contempt, who refused to answer any questions regarding his estate, even though the answer would criminate himself. s. c. 2 Ves. & B. 244. In Pratt's case, 1 Glyn & J. 58, and Mont. & B. 203, the doctrine was broadly stated, that the bankrupt was bound to disclose all circumstances respecting his property, be the consequences what they might. And see *Ex parte* Meymot, 1 Atk. 200; *Ex parte* Nowlan, 11 Ves. 514. But in *Ex parte* Kirby, 1 Mont. & McA. 229, Lord *Lyndhurst* was unwilling to admit that the commissioners could dispense with the general rule of law, that no person can be compelled to criminate himself. The rule, however, in view of later cases, which went to a great extent upon the opinion of Lord *Eldon*, above quoted, we think may be stated as follows: The bankrupt may be compelled to answer any question relating to the *disposition* of his property, even though the answer may *tend* to criminate him. The principle of the rule is well illustrated in the case put by *Erskine*, C. J., in 2 Deacon & Ch. 214, *In re* Heath. "Now with respect to the proposition put by Mr. Montague, I agree with him, that you could not ask a man

A bankrupt who holds property in a fiduciary capacity, and has a debt or balance from his own assets in favor of the property so held by him in trust, may prove the debt against his own estate. (*h*)

Some of the most difficult questions which occur in bankruptcy or insolvency arise where partnerships are concerned. It is a very simple thing for a partnership to prove a debt, or to go into insolvency. But the different and clashing rights of the creditors of the firm, and the creditors of the several members of it, of which we have treated in our chapter on Partnership, often create difficulty. (*i*) It is, however, one of fact rather than law. The whole property may pass in the usual way through the hands of one assignee, by one insolvency; or of one assignee chosen under distinct applications for insolvency, the partnership indebtedness and the several indebtedness being separated; or they may be entirely distinct insolvencies. This must depend upon the law or the practice of each State. Generally, we should say that one insolvency, and one assignee, could settle all the questions to most advantage. (*j*)

whether he had not robbed another of a sum of money; because, if he had so robbed, the money would not be the property of the assignees but of the party robbed; it would be, in fact, no discovery of the *estate of the bankrupt*. But I can see no objection to this question (unless it might be regarded as a chain in evidence to convict the party of robbery), namely, 'Had you not on such a day, and at such a place, 100*l*.?' And according to the answer you might then interrogate what he had done with it. In the present case the question is, 'What have you done with this property?' not, 'How did you obtain it?' And I think all the cases have been decided in that way of looking at the question." The courts may enforce answers to their questions by committing for contempt. Kimball *v.* Morris, 2 Met. 575; Archbold, 278.

(*h*) *Ex parte* Shaw, 1 Glyn & J. 127; *Ex parte* Watson, 2 Ves. & B. 414; *Ex parte* Marsh, 1 Atk. 158, s. c. Cooke, 408; *Ex parte* Richardson, 3 Madd. 138, Buck, 202. But it has been also held, that, when such debts are proved by the bankrupt, and the dividend paid, the amount shall not go into the hands of the bankrupt himself, but be deposited to the account of the estate, or paid into court. *Ex parte* Brookes, Cooke, 137; *Ex parte* Leeke, 2 Bro. Ch. 596. In this case, and on this point, the Lord Chancellor said: "I apprehend, in strictness, the bankrupt ought to be admitted a creditor for that which he has as executor, against his own estate; but it would be evidently improper to suffer the money to come into the hands of the bankrupt. In the present case, there is nothing but money in the hands of the assignees, and the creditor has such an interest in it as to entitle him to have it retained in court." And see *Ex parte* Llewellyn, Cooke, B. L. 135; *Ex parte* Ellis, 1 Atk. 101; *Ex parte* Shakeshaft, 3 Bro. Ch. 198; *Ex parte* Moody, 2 Rose, 413.

(*i*) See Vol. I. of this work, p. 147, *et. seq.*

(*j*) For an elaborate examination of the subject of bankruptcy, with reference to its effect on partnerships, see Collyer on Partnership, Story on Partnership, Gow on Partnership, Watson on Partnership, and Bisset on Partnership, under the titles of Bankruptcy and Insolvency.

These difficulties are very much increased and complicated when two or more insolvent firms are connected in business, and still more when one or more persons belong to all the firms, in each of which, however, there are other persons. And not unfrequently, in such cases, the connection in business leads to a mode of keeping the accounts, or of making charges and entering credits in one or all of the firms, which makes the difficulty still greater. It would, however, be difficult in any work, and impossible in a single chapter like this, to present any rules of law which would help to disentangle such cases. And indeed the rules and principles applicable to them do not belong peculiarly to insolvency, but to partnership, sale, agency, or other branches of the law of contracts.

The dividends are declared at meetings called for that purpose. And it is the duty of the assignee to settle questions, arrange his accounts, collect the assets, and do what else is necessary without any unnecessary delay, so that the funds of the insolvent may pass into the hands of the creditors, to whom they belong, as soon as may be. And delay, for which no good cause exists, would be a strong reason for removal of the assignee (*k*)

A debt may be proved at any meeting. The reason is, that it would be unjust wholly to exclude an actual and honest creditor merely for not presenting his claim at an earlier period. (*l*) But it is also provided in our statutes generally, that the former dividends are not to be disturbed. That is, no one coming in after a dividend has been declared and become payable, can take from creditors what they have received, or from the funds what is necessary to pay the dividends due to others; but the new-comer may receive not only the further dividends, but the past dividends, if the assignee has new and unappropriated funds which can pay them.

(*k*) The decisions of the courts in relation to declaration of dividends, &c., are found to be based so exclusively on statute provisions, that it is deemed inexpedient to go into the citation or discrimination of authorities. It becomes necessary, in all matters of form and order of this character, to consult strictly the directions of the insolvent laws. The statement of the law in the text, will be found to conform with the usual statute provisions. See stat. 12 & 13 Vict. c. 106; the late National Bankrupt Law of the United States; the insolvent laws of the various States.

(*l*) Minot *v.* Thayer, 7 Met. 348; Fletcher *v.* Davis, id. 142

SECTION XIII.

OF THE DISCHARGE.

Whether a discharge operates as a complete satisfaction of the debt, or releases the insolvent from imprisonment, or leaves him and his future property as open to all process of arrest or attachment as before, depends upon the statutory provisions. The prevailing effect, in this country, is an entire discharge of the debt. (*m*) But all the statutes, or nearly all, contain provisions intended to prevent a fraudulent insolvent from getting this relief; and the general way is, by requiring an assent to his discharge from a certain number, or proportion in value or number, or both of his creditors; and it is usually a majority in number and value.

This discharge must be declared at a meeting called for the

(*m*) The provisions relating to the effect of the discharge vary in different States. The statutes of Arkansas, New Jersey, North Carolina, Mississippi, Tennessee, Illinois, Georgia, Missouri, Connecticut, Pennsylvania, and Ohio, exempt only the person of the debtor from imprisonment. Stat. of N. J. 1847, tit. 9, ch. 4; Rev. Stat. of Arkansas, 1837; Stat. of Conn. 1838, p. 270; Ohio Rev. Stat.; Code of North Carolina; Statute Laws of Tennessee. The statutes of California, Michigan, Mississippi, and Massachusetts, and in the majority of the States at this day, provide for the discharge of the insolvent from liability for the debt itself, if his property is assigned and distributed among his creditors. Laws of Cal. 1850–53, ch. 80; Rev. Stat. of Michigan, 1837, tit. 7, ch. 3; Massachusetts Insolvent Laws of 1838. The laws of New York upon this subject differ in important respects from those of many of the States. We give a few of its provisions, as abridged from the statutes by Chancellor *Kent:* "The insolvent laws of New York enable the debtor, with the assent of two-thirds in value of his creditors, and on the due disclosure and surrender of his property, to be discharged from all his debts contracted within the State, subsequently to the passing of the insolvent act, and due at the time of the assignment of his property, or contracted before that time, though payable afterwards. The creditor who raises objections to the insolvent's discharge is entitled to have his allegations heard and determined by a jury. The insolvent is deprived of the benefit of a discharge, if, knowing of his insolvency, or in contemplation of it, he has made any assignment, sale, or transfer, either absolute or conditional, of any part of his estate, or has confessed judgment, or given any security with a view to give a preference for an antecedent debt to any creditor. The discharge applies to all debts founded upon contracts made within the State, or to be executed within it; and for debts due to persons resident within the State at the time of the publication of notice of the application for a discharge; or to persons not residing within the State, but who united in the petition for his discharge, or who accept a dividend from his estate." For the construction of the New York statute, on this subject, see Stanton *v.* Ellis, 2 Kern. 575. See 1 Law Rep. 273.

purpose. There any creditor may object to it; and may prove any facts or urge any objections which would prevent it. These resolve themselves into the misconduct of the insolvent; and are mainly his generally fraudulent acts, or specifically his concealment of effects, or preference in contemplation of insolvency. (*n*)

In former parts of this book we have stated, as a general rule, that no creditor is permitted to obtain an undue advantage over another. If one is promised any advantage if he will sign, in order that his signature may bring in others, this promise is illegal and void. And, in general, any act of the insolvent or the assignee, which secures to any one or more creditors advantages over the rest, would not only be ineffectual at law, but would, if the insolvent were in fault, prevent him having a discharge. (*o*)

(*n*) The grounds on which the bankrupt's certificate and discharge may be disallowed are various. Those which were adopted in the late national act, are substantially the same with those which occur in the statutes in general. The discharge may be disallowed: — 1. When a majority of creditors, in number and value, who proved their debts, file their written dissent to the granting the certificate. 2. When the bankrupt has been guilty of any fraud, or wilful concealment of his property or rights of property. 3. Or shall have preferred any of his creditors, contrary to the provisions of the statute. 4. Or shall have wilfully omitted or refused to comply with any orders or direction of the court, or conform with any other requisition of the act. 5. Or shall, in the proceedings under the act, have admitted a false or fictitious debt against his estate. 6. Or (being a merchant, banker, factor, broker, underwriter, or marine insurer) shall not have kept proper books of accounts after the passing of the act. 7. Or shall have applied trust funds to his own use since the passing of the act. 8. Or (the application being voluntary) shall, after the first of January, 1841, or at any other time in contemplation of the passage of a bankrupt law, by assignment or otherwise, have given or secured any preference to one creditor over another. In the matter of Alonzo Pearce, 6 Law R. 261, was a case in which Judge *Prentiss* learnedly discussed the objections to a discharge. See also, the cases cited on the subjects of conveyances in contemplation of bankruptcy, and fraudulent preferences, *ante*. In the matter of Wilson, 6 Law Rep. 272. If the debtor give a creditor a note, to induce him to withdraw opposition to his discharge, the discharge will be avoided. Bell *v.* Leggett, 3 Seld. 176; Ruckman *v.* Cowell, 1 Comst. 505. But it will not be avoided because the debtor paid money to counsel for advice, though the debtor neglected to publish the fact. Lyon *v.* Marshall, 11 Barb. 241. Nor, it has been held in New York, by payments in contemplation of bankruptcy, in fraud of the bankrupt law, after certificate granted. Caryl *v.* Russell, 18 Barb. 429; N. A. Fire Ins. Co. *v.* Graham, 5 Sandf. 197; but see Breton *v.* Hull, 1 Denio, 75; Chamberlin *v.* Griggs, 3 Denio, 9. As to how the validity of such discharges may be contested in chancery, see Penniman *v.* Norton, 1 Barb. Ch. 246; Alcott *v.* Avery, id. 347.

(*o*) In addition to the cases cited *supra*, see also, Rice *v.* Maxwell, 13 Smedes & M. 289; Wells *v.* Girling, 1 Brod. & B. 447; Stock *v.* Mawson, 1 B. & P. 286; Thomas *v.* Courtnay, 1 B. & Ald. 1; Cecil *v.* Plaistow, 1 Anst. 202; Howden *v.* Haigh, 11 A. & E. 1033; Wilson *v.* Ray, 10 id. 82; Took *v.* Tuck, 4 Bing. 224; Knight *v.* Hunt, 5 Bing. 432; Britten *v.* Hughes, id. 460; Leicester *v.* Rose, 4 East, 372; Cockshott *v.* Bennett, 2 T. R. 763; Jackson *v.* Duchaire, 3 id. 551; Jackson *v.* Lomas, 4 id. 166; Holmer *v.* Viner, 1 Esp 131; Butler *v.* Rhodes, id.

The statutes sometimes specify with great minuteness what the discharge shall do, and against what creditors or claims it shall be effectual. Aside from these provisions, it may be considered as a universal rule, that this discharge or certificate operates fully against all creditors whose debts were actually proved. It is as certain, perhaps, that it does not affect debts which were not proved, because they could not be proved from their own nature. (*p*) The law may not be so certain as to those of a third class, — those which might have been proved, but were not so in fact. We hold, however, that the better reasons and the weightier authority lead strongly to the conclusion that all such debts are barred. (*q*) And, that the statutes of insolvency may have their full beneficial effect as statutes of

236; Steinman *v.* Magnus, 11 East, 390; Feise *v.* Randall, 6 T. R. 146; Hawley *v.* Beverley, 6 Man. & G. 221; Gibson *v.* Bruce, 5 id. 399. And in an action against a defendant, to recover moneys alleged to have been paid him by the bankrupt, in fraud of the bankrupt laws, &c., the judge, assuming that there was importunity and pressure on the part of the defendant, left it to the jury to say whether the bankrupt had made these payments in consequence of such importunity and pressure, or with a view of giving defendant a fraudulent preference in contemplation of bankruptcy; it was held, that *the defendant* had no right to complain of this direction. Cook *v.* Pritchard, 5 Man. & G. 329; Bryant *v.* Christie, 1 Stark. 329.

(*p*) Where an action had been brought upon a debt, and before judgment, the debtor took advantage of the insolvent law, and afterwards the creditor proceeded to judgment, it was held, that the original debt was not provable under the insolvency, because merged in the judgment, and that the judgment was not provable, because not in existence at the time of the publication of the notice of issuing the warrant; but that the judgment debt, being thus in its nature incapable of proof, would be a valid and subsisting claim against the insolvent. Sampson *v.* Clark, 2 Cush. 173. See, for the English doctrine on this point, *Ex parte* Birch, 4 B. & C. 880; Greenway *v.* Fisher, 7 id. 436; Kellogg *v.* Schuyler, 2 Denio, 73; Thompson *v.* Hewitt, 6 Hill, 254; Buss *v.* Gilbert, 2 M. & S. 70; *Ex parte* Charles, 16 Ves. 256; May *v.* Harvey, 14 East, 197; Crouch *v.* Gridley, 6 Hill, 252; Hendricks *v.* Judah, 2 Caines, 25; Bosler *v.* Kuhn, 8 Watts & S. 183; Savory *v.* Stocking, 4 Cush. 607.

(*q*) "The enactments of the bankrupt law treat the bankrupt as the legal owner of the property up to the issuing of the decree, and tie down the title of the assignee to that time, so as to preclude its relation back. All the property then owned by the bankrupt passes to and vests in the assignee, and consequently, all debts existing before and at the date of the decree, are provable under the bankruptcy, and all debts up to that time barred by the bankrupt's certificate of discharge." *Prentiss*, J., in Downer *v.* Brackett, 5 Law Rep. 392, 399; Fisher *v.* Currier, 7 Met. 424; Graham *v.* Pierson, 6 Hill, 247; Davis *v.* Shapley, 1 B. & Ad. 54; Fox *v.* Woodruff, 9 Barb. 498; Hubbell *v.* Cramp, 11 Paige, 310; Jemison *v.* Blowers, 5 Barb. 686, where it was held, that a covenant in a deed for quiet enjoyment, was provable in its character, and therefore barred. But not a fine imposed by the Court of Chancery for violation of an injunction. Spalding *v.* The People, 7 Hill, 301. It seems that a fiduciary debt, which is excepted from the operation of the bankrupt law, may be proved or not, at the option of the creditor. If it is proved, it is barred. If not, the certificate of discharge has no effect whatever on the existence of the debt. In the matter of Tebbetts, 3 Law Rep. 259; Morse *v.* Lowell, 7 Met. 152; Chapman *v.* Forsyth, 2 How. 202.

repose, we should extend them even to debts which were not proved by reason of some personal hinderance or ignorance of the creditor, but which were in their own nature provable. (*r*)

If the certificate was granted when it ought not to have been, or if it can be impeached on other grounds, and such a certificate is offered in bar to a suit by a creditor, the plaintiff will not be prevented from impeaching it by the mere fact that he had proved his debt. (*s*)

SECTION XIV.

OF PRIVILEGED OR PREFERRED DEBTS.

While the whole purpose of the insolvent law is to put all the creditors upon exactly the same footing, there are still some debts or claims which are preferred by law, and paid in full. These vary in the different states. Generally, they may be said to be, all amounts due to the United States; (*t*) all that are due to the State in which the insolvent resides, and the insolvency takes place; and a certain limited amount due for

(*r*) As to the effect of an election to prove, by a creditor residing in another State, see *ante*, sect. 2, note (*u*), p. 437, where the cases are fully cited.

(*s*) "The creditors of an insolvent may well prove their claims, and receive their dividends, upon the assumption that the insolvent has in all respects truly conformed to the requisites of the laws, that he has concealed no effects, and made no conveyances for the purpose of giving preferences, nor in any way violated the principles of a full and equal distribution of his effects. Acting upon this assumption, the creditor may prove his claim, and receive his dividend, without prejudice to his right to avoid the discharge of the insolvent, if future developments shall show the commission of those acts, or the neglect of those duties, on the part of the debtor, by reason of which his discharge is rendered invalid. It is no part of the duty of the creditor to assume in advance that the debtor has been guilty of fraudulent acts, in violation of the insolvent laws, and to regulate his conduct by such presumption. He may, therefore, prove his claim, and receive a dividend, without compromitting his further right to enforce payment of the residue of his demand, if the debtor has obtained his discharge under such circumstances as to render it invalid in law." *Dewey*, J., in Morse *v.* Reed, 13 Met. 62.

(*t*) United States *v.* King, J. B. Wallace, 13. *Tilghman*, C. J.: "Upon the best consideration which the circumstances will permit us to bestow on the point, we are of opinion, that debts due to the United States are not within the provisions of the bankrupt law; but that the debtor, his lands and effects, present and future, are liable to actions and remedies for their recovery, as before the passing of that act." United States *v.* Hewes, 2 Law Rep. 329; United States *v* Wilson, 8 Wheat. 253.

labor or personal service rendered within a brief period before the insolvency. To these are sometimes added the costs of attachments, or other costs which have been terminated by the insolvency.

It has been found peculiarly difficult to collect and arrange the cases on the subject of bankruptcy and insolvency in a satisfactory manner. The decisions are, to so great an extent, founded on the special provisions of statutes, that it has seldom been easy to extract from them what might properly be termed a general principle. Hundreds of cases have been examined, which have proved wholly useless for the general purposes of a text-book, for it has been our aim to insert such and such only, as should elucidate, in some measure, the *principles* relating to this subject.

It will be seen that a majority of cases cited are from the English books. The reason is, that the American cases rest, to a much greater extent than the English, on the special provision of the statutes. Few statutes have been cited, but the English Consolidated Bankrupt Act, 12 & 13 Vict. c. 106, and the late United States Bankrupt Act have been often referred to. The one presents very strongly and clearly the present English doctrine on this subject; and the other may be said to be the best illustration which any one American statute affords, of the legislation on this side the Atlantic.

CHAPTER XIII.

THE CONSTITUTION OF THE UNITED STATES.

Sect. 1. — *What are Contracts, within the clause respecting the obligation of them?*

In the tenth section of the first article of the Constitution of the United States, it is provided, that "no State shall . . pass any . . law impairing the obligation of contracts." (*a*) Under this clause two questions of great importance have been agitated. One is, what is a contract within the meaning of this section? (*b*) The second is, what operation upon or interference with a contract, is to be considered as impairing the obligation thereof? Neither question has received a positive and universal answer, settling by definition all the subordinate questions which may arise under it. But we have authoritative and instructive adjudication upon both.

It seems to be settled conclusively, that a grant is a contract; executed, it is true, but still a contract; and that it comes within the scope of this provision (*c*) and therefore, if there be a grant,

(*a*) This clause does not apply to laws enacted by the States before the first Wednesday of March, 1789 — the day when the constitution of the United States went into operation. Owings *v.* Speed, 5 Wheat. 420. Nor does it affect the powers of Congress. Evans *v.* Eaton, Pet. C. C. 322.

(*b*) "The provision of the constitution never has been understood to embrace other contracts than those which respect *property, or some object of value,* and confer rights which may be asserted in a court of justice." Dartmouth College *v.* Woodward, 4 Wheat. 518; per Marshall, C. J., 629.

(*c*) Therefore, the grant of lands by the legislature of a State, constitutionally empowered to make it, cannot be revoked by its successor. See Fletcher *v.* Peck, 6 Cranch, 87, 136. *Marshall,* C. J.: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says *Blackstone,* differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts

in itself valid, any law which is, or permits, a direct interference with the enjoyment of the things granted, or a diminution of their value, or any deprivation of the things granted, or of the rights or interests belonging to them, by the grantor, impairs the obligation of the contract. (*d*)

This must be true, in general; but it must also be subject to some important qualifications. For the exercise of the ordinary powers of government, which it could not have been intended to take away or control by this provision, may often have the effect of diminishing the value of things previously granted. Thus, if a State sold a piece of land for two dollars an acre, and soon after sold similar and adjoining land, differing in no respect from the first, for one dollar an acre, and announced this as its price, the market value of the lands first sold would fall, perhaps, one half; yet no one could doubt that the State had a right to make this second sale. But it is easy to

to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues; and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of this provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each State." Dartmouth College *v.* Woodward, 4 Wheat. 656, per *Washington*, J.; Rehoboth *v.* Hunt, 1 Pick. 224; Lowry *v.* Francis, 2 Yerg. 534; Butler *v.* Chariton County Court, 13 Mo. 112. So, where the grant is to a corporation, the State cannot revoke it; Terrett *v.* Taylor, 9 Cranch, 43; Wilkinson *v.* Leland, 2 Pet. 657. See Den *d.* University of North Carolina *v.* Foy, 1 Murph. 58.

(*d*) Winter *v.* Jones, 10 Ga. 190; Planters Bank *v.* Sharp, 6 How. 301, 327.

proceed from this question, to which the answer is obvious, to others in which it is more difficult. And all we can say, on authority, upon the general question, what limits are imposed upon the operation of the clause under consideration, by the necessity of leaving unimpaired all the functions of government and the control by the public of all public interests, would seem to be this: we may say, that the clause is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of a State may at any time deem expedient. (*e*) This rule seems to spring from an obvious necessity; but it rests also upon an obvious and sufficient reason. This is, that in relation to public property, there is no grant; no contract whatever, executed or executory. By such an act, the public, by the legislature, which is its agent, gives something of its own to somebody else, who is also its agent. Nothing then, in fact, is given; for nothing goes forth from the public. The whole transaction amounts to no more than a change made by the public, in the manner in which, or the agents by whom, it shall continue to hold and use a certain portion of its property or interests. The very essence of a contract — *two* parties, with mutual obligations — is wanting; and it is therefore no contract at all. Therefore all political powers conferred by the legislature on a municipal corporation may be revoked. (*f*) But on the other hand, if private property or franchises are granted to a municipal corporation, this grant cannot be revoked, nor the property or rights conferred by it in any way divested by the State. (*g*) Nevertheless, the State does not lose its right of making laws concerning

(*e*) Dartmouth College *v.* Woodward, 4 Wheat. 518, 629. *Marshall*, C. J.: "That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." Philips *v.* Bury, 2 T. R. 352; Knoup *v.* The Piqua Bank, 1 Ohio St. 603, 609; Toledo Bank *v.* Bond, 1 Ohio St. 657, per *Bartley*, C. J.

(*f*) The People *v.* Morris, 13 Wend. 325; Marietta *v.* Fearing, 4 Ohio, 427; Terrett *v.* Taylor, 9 Cranch, 43; Bradford *v.* Cary, 5 Greenl. 339, 342; Bush *v.* Shipman, 4 Scam. 186; Trustees of Schools *v.* Tatman, 13 Ill. 27; Mills *v.* Williams, 11 Ired. 558.

(*g*) Terrett *v.* Taylor, *supra*; Town of Pawlet *v.* Clark, 9 Cranch, 292; Dartmouth College *v.* Woodward, 4 Wheat. 518; Bailey *v.* The Mayor of New York. 3 Hill, 531; Hazen *v.* The Union Bank of Tennessee, 1 Sneed, 115.

the things granted, so far as they remain *publici juris*, or so far as it sees fit to provide for the due exercise of the rights granted, or the proper use of the property granted, for the public benefit and safety. (*h*) So the salary and tenure of an office prescribed by law, do not constitute a contract which is protected by this clause in the constitution; and they may, therefore, be modified or reduced unless this is prohibited by the constitution of the State. (*i*)

(*h*) In Benson *v.* The Mayor, &c. of New York, 10 Barb. 223, it was held, that ferry franchises may be held by a municipal corporation, without losing their character as private property, and when accepted and acted upon they cannot be resumed by the State; but that the State is not excluded from legislation touching them, so far as they are *publici juris*, and may pass laws to secure the safety of passengers and protect them from imposition, &c. In East Hartford *v.* Hartford Bridge Co. 10 How. 511, s. c. 17 Conn. 79, the reasoning of *Woodbury*, J., delivering the opinion of the court, indicates the opinion that ferry franchises, when granted to municipal corporations, are public privileges, in the nature rather of public laws, than of contracts to be modified or abolished by the legislature, as the public interests demand; but the circumstances of the case did not call for the opinion, as in that case the ferry right was in express terms to be held during the pleasure of the General Assembly.

(*i*) Warner *v.* The People, 2 Denio, 272; Conner *v.* The City of New York, 2 Sandf. 355, 1 Selden, 285; Knoup *v.* The Piqua Bank, 1 Ohio State, 616, per *Corwin*, J.; Toledo Bank *v.* Bond, id. 656; Commonwealth *v.* Bacon, 6 S. & R. 322; Commonwealth *v.* Mann, 5 Watts & S. 418; Barker *v.* Pittsburg, 4 Barr, 51; The West River Bridge Co. *v.* Dix, 6 How. 548; Butler *v.* Pennsylvania, 10 id. 402. In 1836, the State of Pennsylvania passed a law directing canal commissioners to be appointed annually by the governor, and that their term of office should commence on the first of February in every year. The pay was fixed by the law at four dollars *per diem*. In April, 1843, certain persons being then in office as commissioners, the legislature passed another law, providing amongst other things that the *per diem* should be only three dollars; the reduction to take effect upon the passage of the law; and that in the following October, commissioners should be elected by the people. The commissioners claimed the full allowance, during the entire year, upon the ground that the State had no right to pass a law impairing the obligation of a contract. It was held, that there was no contract between the State and the commissioners, within the meaning of the constitution of the United States. *Daniel*, J.: "The contracts designed to be protected by the 10th section of the first article of that instrument, are contracts by which *perfect rights, certain definite, fixed, private rights* of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government, for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establish-

The reason for the difference, as to the operation of this section upon public and upon private property, will also help us to answer the next question: What is private property, in this sense and for this purpose? The answer is, any thing and every thing which has gone *out of* the public, by its grant or its sanction. To determine any particular case, therefore, we should take the instrument referring to the property, whether it be a statute or any thing else, and ask whether, if read rationally and honestly, it leaves the usufruct of the property and interests substantially in the possession, or the management thereof within the control of the public, by such agents as it may appoint, or not. If it does, then it is public property, and this clause does not attach; if it does not, then it is private property, and this clause does attach.

Thus, it has been very solemnly, and we hope authoritatively decided, that a corporation is a person who may take a grant as well as any individual; that a corporation, created by the legislature, or adopted by the legislature, and endowed with certain powers and functions and property, the legislature reserving no interest in what is given them, and no control over the succession of persons who form the corporation, or over the exercise of their functions, — such a corporation is a private corporation, to whom a franchise has been given, by a grant, which is an executed contract, and that any deprivation of their property, or any disturbance or denial of their rights and functions, impairs the obligation of the contract. And if the legislature have reserved to themselves rights in the creation of such

ment of such a principle would arrest necessarily every thing like progress or improvement in government; or if such changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a State, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community." See Allen *v.* McKeen, 1 Sumner, 276. See also, in Whillington *v.* Polk, 1 Harris & J. 236; a strange case, in which Luther Martin brought an action on an *assize sur novel disseisin*, to maintain the right of a judge to his seat after the court had been destroyed by a statute repealing that under which the judge was appointed.

corporation, or in any grant to them, these reservations are to be strictly followed; whatever lies without them being as if there were no reservations whatever. (*j*)

That the charters of private civil corporations, — of which banks, or insurance, turnpike, and railroad companies, are leading instances, — are contracts, protected by this clause in the constitution of the United States, seems to be well settled. (*k*)

(*j*) Dartmouth College *v.* Woodward, 4 Wheat. 519. The law of this case is, that an eleemosynary corporation, founded by private contributions for the distribution of a general charity, is not an instrument of government, whose officers are public officers, but a private corporation, whose charter is a contract between the donors, the trustees and the government, founded on the consideration of public benefit to be derived from the corporation, which cannot be altered, amended, or modified by the State without the consent of the corporation. It also decides that the charters, granted by the crown before the Revolution, are within this principle, except so far as they were affected by the legislation of parliament or of the colonies, before the adoption of the U. S. Constitution; and the doctrine that civil rights were not destroyed by the Revolution, is well established. Dawson *v.* Godfrey, 4 Cranch, 323; Terrett *v.* Taylor, 9 id. 43; Society, &c. *v.* New Haven, 8 Wheat. 464. The case of Dartmouth College *v.* Woodward has often been affirmed, both in the State and Federal courts, and cited as an unquestionable authority. Trustees of Vincennes University *v.* Indiana, 14 How. 268; Norris *v.* The Trustees of Abingdon Academy, 7 Gill & J. 7; Grammar School *v.* Burt, 11 Vt. 632; Brown *v.* Hummel, 6 Barr, 86; The State *v.* Heyward, 3 Rich. 389. It is insisted, in Toledo Bank *v.* Bond, 1 Ohio St. 670–679, that the case of Dartmouth College *v.* Woodward did not decide the *franchise* or *charter* of a corporation to be a *contract*, but only that the *circumstances of the case* constituted a *contract* between the donors and the corporators, for the conveyance and perpetual application of private property, for the purposes of the trust under the charter, and that this contract was impaired by the State laws which did not merely interfere with the charter, but also transferred the private property held by the trustees to another corporation in violation of the terms of the contract by which the trust had been created and the property invested.

(*k*) Thus if a bank has, by its charter, an express or implied power to sell and transfer negotiable paper, a law taking away this power impairs the obligation of a contract and is void. Planters Bank *v.* Sharp, 6 How. 301; The People *v.* Manhattan Co. 9 Wend. 351. See also, Providence Bank *v.* Billings, 4 Pet. 560; Turnpike Co. *v.* Phillips, 2 Penn. 184; Claghorn *v.* Cullen, 13 Penn. St. 133; Com. Bank of Natchez *v.* The State of Mississippi, 6 Smedes & M. 599; Backus *v.* Lebanon, 11 N. H. 19; Michigan State Bank *v.* Hastings, 1 Doug. 225; Miners Bank *v.* United States, 1 Greene (Iowa), 553; Bank of the State *v.* Bank of Cape Fear, 13 Ired. 75. It has recently been held in Ohio, that a charter is a legislative enactment, subject to amendment or repeal, possessing the form and essential elements of a law, and not those of a contract, and that an incorporated banking institution is a public corporation, appointed for public purposes, subject to the control of the public, the charter of which is held at the pleasure of the sovereign power. Mechanics and Traders Bank *v.* Debolt, 1 Ohio St. 591; Toledo Bank *v.* Bond, id. 622: Knoup *v.* The Piqua Bank, id. 603, 609. Per *Corwin*, J.: "I maintain that a banking institution is a *public* institution, appointed for public purposes; never legitimately created for private purposes, its creation proceeding solely upon the idea of public necessity or public convenience, and that, being appointed by the public, solely for public uses, all its operations are subject to the control of that public, who may, from time to time, as the public good may require, enlarge, restrain, limit, modify its powers and duties, and, at pleasure, dispense with its benefits. The agency, during its continuance, is equally independent, within its sphere, and upon a modification of its

But any charter may contain within it an express reservation to all future legislatures, of repeal or modification; and this right may be secured, as to all subsequent charters, by a general statute relating to any specified class of corporations. (*l*)

SECTION II.

WHAT RIGHTS ARE IMPLIED BY A GRANT.

It is an important question, what are the rights or interests which are, *by implication*, a part of an expressed grant, so that interference with them is prohibited by this clause. One answer would be, that every grant must be construed with absolute strictness; and nothing whatever be added, by implication or construction, to that which is expressly given. Another, that every thing which is requisite for the full enjoyment and most beneficial use of the thing granted, must be supposed to be given with the grant, or be contained in it; for it shall be construed strictly against the grantor, and the grantee has a right to the enjoyment, in fact, of the whole benefit of all that was given. But the true rule would permit some extension of the grant by

terms unsuited to its pleasure, the agency itself may be renounced and surrendered. So the rights of the agent to the profits and emoluments of the agency, as they may, from time to time, be prescribed, will be sacredly regarded and enforced by the courts of justice; but like every other agency, it is revocable at the will of the principal." A doctrine not wholly unlike this, is implied, or indeed asserted, in Butler *v.* Palmer, 1 Hill, 324. There, an act passed May 12, 1837, gave the assignee of a mortgagor one year to redeem after a sale. An act passed April 18, 1838, repealed the former act, the repeal to take effect after Nov. 1, 1838. An assignee of a mortgagor, on Nov. 3, but within one year from the sale to him, offered to redeem. But it was held, that he was barred by the repeal of the first act.

(*l*) No reservations but those expressed in the charter can be introduced by the legislature, without the consent of the corporation. Washington Bridge Co *v.* The State, 18 Conn. 53. In Massachusetts there are statutes as to banking corporations, others as to manufacturing corporations, and others as to other corporations, which would certainly operate upon any particular charter, as if a part of it. In Stanley *v.* Stanley, 26 Me. 191, it was held, that a statute making the stockholders liable for the debts of the corporation, was valid in respect to debts subsequently contracted, and was binding on one who became a member of the corporation after the passage of the act. In Williams *v.* Planters Bank, 12 Rob. (La.), 125, and Payne *v.* Baldwin, 3 Smedes & M. 661, it is held, that banks may be required to receive their own bank-notes in payment of debts due to them, although under par in the market.

implication, or rather would construe it to include, beside all that is expressly given, whatever else is strictly necessary to any beneficial use of the thing given, and would stop there. It would not be satisfied with a merely literal fulfilment of the contract, if this was in fact no actual discharge of it whatever, but a mere evasion of its provisions. But if the literal construction gave some beneficial use of the property or franchise, the grantor would not be held to have bound himself by implication from such further action as might prevent this use from being beneficial to the extent which might otherwise have been attained, and was originally expected (*m*)

It is this view which the courts seem to have adopted. And the difficulties, or even errors, in fact, which may attend the application of such a rule to the circumstances of various cases, are not sufficient to justify a denial of the principle itself, which seems to be rational and just. For if the grantee wished to secure to himself all possible, or even probable and natural advantages, it was his business to ask for them. And if he did not, it was his neglect, or else he forbore to ask lest he should be denied, preferring to rest upon construction; and this conduct would certainly be entitled to no favor. And it is, therefore, not too much to say, that a legislative grant shall not be held to *intend* exclusive privileges, as appurtenant to a franchise expressly given. (*n*)

(*m*) United States *v.* Arredondo, 6 Pet. 736; Beaty *v.* Knowler, 4 id. 152; Providence Bank *v.* Billings, id. 514; Jackson *v.* Lamphire, 3 id. 289; Charles River Bridge *v.* Warren Bridge, 11 id. 548. *Taney*, C. J.: "The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court (referring to Providence Bank *v.* Billings), was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interests, the same principle applies, and the rule of construction must be the same." The Richmond R. R. Co. *v.* The Louisa R. R. Co. 13 How. 81. Per *Grier*, J.: "It is a settled rule of construction adopted by this court, that public grants are to be construed strictly. This act contains the grant of certain privileges by the public to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this, — that any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the act."

(*n*) Charles River Bridge *v.* Warren

SECTION III.

OF AN EXPRESS GRANT OF EXCLUSIVE PRIVILEGES.

We thus reach another question. If these exclusive privi eges are expressly given, how does this clause of the constitu

Bridge, 11 Pet. 420, 6 Pick. 376, 7 id. 344. In this, the leading case on this topic of constitutional law, the legislature of Massachusetts, in 1785, granted a charter to a company for the building of a bridge over Charles River, from Boston to Charlestown, under the name of the Charles River Bridge, and taking tolls of persons passing over it, for the term of forty years, extended by a subsequent act to seventy years. In 1828, before the expiration of the charter, an act was passed authorizing the erection of the Warren Bridge, a few rods from the former, which was to become free in six years. The tolls of the Charles River Bridge were thereby reduced to a very small amount. It was held, that the grant of franchises by the public, in matters where the public interests are concerned, as exemption from taxation and the right of the State to open new roads and construct new bridges, are to be construed strictly; that nothing passes by implication, and no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, convey; and that, as the charter, in its terms, granted no exclusive rights above and below the bridge, and contained no stipulation, on the part of the State, not to authorize another bridge above or below it, no such exclusive right of the plaintiff company could be implied. *Taney*, C. J.: "It may perhaps be said, that in the case of the Providence Bank, this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations." pp. 547, 548. *Story*, J., in a dissenting opinion of great length, maintained that the grant to the Charles River Bridge should receive a liberal instead of a strict construction, and that there was necessarily implied in the charter of that company a stipulation that the legislature would charter no other bridge between Charlestown and Boston so near as to injure the former's franchise, or diminish its toll, in a positive and essential degree. "To sum up, then," said he, "the whole argument on this head, I maintain, that upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication that the legislature should do no act to destroy or essentially to impair the franchise; that (as one of the

tion operate on them? If it makes them irrevocable, and forever forbids any repeal or withdrawal of them, or any interference with or modification of them, does it not destroy the power of the legislature to give them, on the ground that they are the agents of the public only for the present, and not for the future; and have no authority, expressly given, or implied from their function and duty as a legislature, to deprive the public of a future exercise of the power which the legislature now abandons? Thus, to put the question in the simplest form: If a State sells a square mile of land, expressly covenanting by its authorized deed, and expressly enacting by a confirmatory statute, that the land shall forever be exempt from taxation, is this

learned judges of the State court expressed it) there is an implied agreement of the State to grant the undisturbed use of the bridge and its tolls, so far as respects any acts of its own, or of any persons acting under its authority. In other words, the State impliedly contracts not to resume its grant, or to do any act to the prejudice or destruction of its grant. I maintain that there is no authority or principle established in relation to the construction of crown grants, or legislative grants, which does not concede and justify this doctrine. Where the thing is given, the incidents without which it cannot be enjoyed are also given, *ut res magis valeat quam pereat.* I maintain that a different doctrine is utterly repugnant to all the principles of the common law applicable to all franchises of a like nature, and that we must overturn some of the best securities of the rights of property before it can be established. I maintain that the common law is the birthright of every citizen of Massachusetts, and that he holds the title-deeds of his property, corporeal and incorporeal, under it. I maintain that, under the principles of the common law, there exists no more right in the legislature of Massachusetts to erect the Warren Bridge, to the ruin of the franchise of the Charles River Bridge, than exists to transfer the latter to the former, or to authorize the former to demolish the latter. If the legislature does not mean in its grant to give any exclusive rights, let it say so expressly, directly, and in terms admitting of no misconstruction. The grantees will then take at their peril, and must abide the results of their overweening confidence, indiscretion, and zeal." pp. 647, 648. In the State court, 7 Pick. 344, the judges were equally divided on the question whether the Charles River Bridge had any exclusive rights beyond its own limits. *Morton*, J. (pp. 461, 464), and *Wilde*, J. (pp. 468, 469), holding against such a right; and *Putnam*, J. (p. 477), and *Parker*, C. J. (p. 506), in favor of such exclusive right beyond its limits. The doctrine of the case of Charles River Bridge *v.* Warren Bridge has been repeatedly confirmed. The West River Bridge *v.* Dix, 6 How. 532, 16 Vt. 446; The Mohawk Bridge *v.* The Utica & Schenectady R. R. Co. 6 Paige, 554; The Oswego Falls Bridge *v.* Fish, 1 Barb. Ch. 547; Thompson *v.* The New York & Harlem R. R. Co. 3 Sandf. Ch. 625; Tuckahoe Canal Co. *v.* Tuckahoe R. R. Co. 11 Leigh, 42; Washington & Baltimore Turnpike Co. *v.* Baltimore & Ohio R. R. Co. 10 Gill & J. 392; Harrison *v.* Young, 9 Ga. 359; McLeod *v.* Burroughs, id. 213; Shorter *v.* Smith, id. 517; White River Turnpike Co. *v.* Vt. Central R. R. Co. 21 Vt. 590; Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co. 17 Conn. 40, 454; Miners Bank *v.* United States, 1 Greene (Iowa), 553; Greenl. Cruise, tit. XXVII. § 29. Of the Charles River Bridge case, it is said by *Barculo*, J., that, "to say the least of it, it stands upon the extreme verge of the law, and perhaps reaches a little beyond justice and good faith." Benson *v.* The Mayor, &c., of New York, 10 Barb. 243. Where the right to build a bridge is given, it is exclusive within its own limits. Piscataqua Bridge *v.* New Hampshire Bridge, 7 N H. 35

covenant binding upon the State, that is, upon future legislatures? (*o*)

An answer to this question would require some consideration of the nature and extent of the rights of supreme sovereignty, and especially of eminent domain; and of the authority of the legislature in relation to them. Undoubtedly the feudal system forms no part of, and no foundation for, our system of legislation, in one sense; but in another, it is true that some of its important principles remain as valid with us at this moment as ever anywhere. One of these is, that all property is held from the sovereign. We hold that the theory of our law goes even further on this point than the feudal system, because it extends this principle to personal as well as real property. And upon this principle rests the law of eminent domain; for *dominium*, from which this phrase comes, bears, as its legal sense, property, and not power. We think that every thing, whatever, that a citizen of this country owns, he holds in the same way as if he could trace his title back to an original grant from the sovereign; and as if this grant contained an expressed reservation of a right by the public or the State, which is the sovereign, to resume the property or any part of it, whenever it shall be wanted for the use of the sovereign; payment or compensation being made, or adequately provided for by law, for all that is thus resumed. And this is what we understand to be, in this country, the law, or the right, of eminent domain. (*p*)

(*o*) See next note. In Richmond R. R. Co. *v.* The Louisa R. R. Co. 13 How. 71, *Curtis*, J., maintained that the State may grant an exclusive right to a railroad within certain limits, and pledge itself not to allow another to be constructed within these limits. See Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35, per *Parker*, C. J.

(*p*) Beckman *v.* Saratoga & Schenectady R. R. Co. 3 Paige, 72, 73; The West River Bridge Co. *v.* Dix, 6 How. 532, 533. *Daniel*, J.: "Under every established government, the tenure of property is derived, mediately or immediately, from the sovereign power of the political body, organized in such mode or exerted in such a way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guaranty. It is owing to these characteristics only, in the original nature of the tenure, that appeals can be made to the laws, either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration, or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals, or between individuals only, there enter con-

This is, then, a right reserved and possessed by the public, and a right which extends over all property. And one question is, whether the people themselves can give away this right, or grant property without this reservation. To this it might be answered, that the people, by their constitutions, bind themselves to act only constitutionally, and that no way is provided for such transfer or relinquishment. But, without now denying that the public might, by some sufficient act, divest themselves of the right of eminent domain, we proceed to the next question,

ditions which arise not out of the literal terms of the contract itself; they are superinduced by the preëxisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested The impairing of contracts inhibited by the constitution, can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question, not being within the purview of the restriction imposed by the tenth section of the first article of the constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and, conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty." That the right of eminent domain is sometimes founded on sovereignty, public necessity, or implied compact, see Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co. 17 Conn. 61; West River Bridge Co. *v.* Dix, 6 How. 539, per *Woodbury*, J.

which is, what is the power and authority delegated to the legislature over or in regard to this right of eminent domain?

We have no doubt whatever, that the true answer to this question is, that the legislature derives, in part from the language common to all our constitutions, in part from implications from their expressions, and in part from the very nature of its functions, full authority to exercise an unlimited power as to the management, employment, and use of the eminent domain of the State, and to make all the provisions consequent upon, or necessary to the exercise of this right or power; but no authority whatever to give this away, or take it out of the people directly or indirectly. Assuming this to be a true principle, let us see how it applies. Let it be certain that the legislature can give to any parties the right to build a bridge over any stream, and between any termini; and as certain, that when the bridge is built they may destroy it for public purposes, on paying or providing for compensation. (*q*) But can

(*q*) West River Bridge Co. *v.* Dix, 6 How. 507 In 1795, the legislature of Vermont granted a charter to the plaintiffs for the term of one hundred years, which invested them with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking tolls for passing the same. Under the authority of a subsequent act of the legislature, a public road was extended and established between certain termini, passing over the plaintiff's bridge, converting it into a public highway, for which compensation was awarded. The new highway was laid out for two miles on one side, and one mile on the other, over a public highway, existing where the bridge was built, and of which it formed a part. It was held, that the act appropriating the franchise of the bridge for the new public highway, compensation being made, was constitutional. *Daniel*, J., delivering the opinion of the court, said: "A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes, namely, that of the right in private persons in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice *Blackstone*, when treating, in his second volume, chap. 3, page 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. *Vide* Bl. Com. vol. 3, chap. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position, with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land

they not only authorize a party to make a bridge, but give to the same party, in express terms, the exclusive right to build a bridge within distant termini, on the one side and the other? This seems to be well settled; nor does it interfere with the eminent domain of the State, for this exclusive right would be a franchise, and this is a property, and it can therefore be taken for public purposes, that is, another bridge may be authorized within these same limits, on making compensation. (*r*)

But let us suppose the grant not to be in terms of any exclusive right; but simply a right to build a bridge from one spot to another; and that this grant contains a clause, promising on the part of the State, that no party shall ever be authorized to build another bridge within five miles, in either direction, from either terminus. Would this promise be binding on future legislatures? (*s*) We confess that we think the question is one

under his patent or contract with the State; and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution, and no violation of a contract. The power of a State, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court. But in England, this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast-Plate Manufacturer *v.* Meredith, 4 Term Reports, 794; and Lord *Kenyon*, especially, in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom." pp. 533, 534. *Woodbury*, J., in a concurring opinion, limited the power of eminent domain over the franchise of a corporation to cases where "the further exercise of the franchise, as a corporation, is inconsistent or incompatible with the highway to be laid out," and where also "a clear intent is manifested in the laws that one corporation and its uses shall yield to another, or another public use, under the supposed superiority of the latter, and the necessity of the case." pp. 543, 544, 546. The doctrine of the West River Bridge Co. *v.* Dix, that the franchise of a corporation may be taken by the State for public uses, or that the power to take it for public uses may be delegated by the State to another corporation, on providing compensation, is confirmed by numerous authorities. S. C. 16 Vt. 446; The Richmond, &c. R. R. Co. *v.* The Louisa R. R. Co. 13 How. 71; Boston Water Power Co. *v.* Boston and Worcester R. R. Co. 23 Pick. 360; Armington *v.* Barnet, 15 Vt. 745; White River Turnpike Co. *v.* Vt. Central R. R. Co. 21 id. 590; Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co. 17 Conn. 41, 454; Barber *v.* Andover, 8 N. H. 398; Peirce *v.* Somersworth, 10 id. 369; Backus *v.* Lebanon, 11 id. 19; Northern Railroad *v.* Concord and Claremont Railroad, 7 Foster, 183; Rogers *v.* Bradshaw, 20 Johns. 725; Beckman *v.* Saratoga & Schenectady R. R. Co. 3 Paige, 45; Lexington and Ohio R. R. Co. *v.* Applegate, 8 Dana, 289; Shorter *v.* Smith, 9 Ga. 517. And the legislature, in delegating this power to a railroad company, need not designate the specific land to be taken. Boston Water Power Co. *v.* Boston and Worcester R. R. Co. 23 Pick. 360.

(*r*) West River Bridge Co. *v.* Dix, 6 How. 507; Shorter *v.* Smith, 9 Ga. 529. The exclusive right is a part of the franchise, which may itself be taken. Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35.

(*s*) In the Richmond, &c. R. R. Co. *v.*

of some difficulty. If no future legislature can authorize another bridge within the five miles on payment of compensation, it must be because this legislature has granted away from the public, for all time, this right of eminent domain. We are clear they cannot do this. And if it be the certain effect of this promise that no such other bridge can hereafter be authorized on any terms, then we say the promise is void, because the legislature, as an agent, had made a contract which they had no authority whatever to make. But why may not a future legislature authorize another bridge, with compensation, in this case, as well as if an exclusive right had been given? The answer may be, that here no property whatever is given, and no franchise whatever; and nothing but a bare promise made. The bridge itself may be taken, for it is property, or the right to build the bridge may be taken, for this is a franchise, and a franchise is property, but no property passes by a mere promise that no other bridge shall be built; and if no property passes, there is nothing which can be taken in making compensation, and then there is no way of exercising this right of eminent domain, or, which is the same thing, this right of eminent domain has been transferred or destroyed, which, as we have seen, cannot legally be done. Such might be the argument, and although technical, we do not deny its force; nor shall we be able to answer this question with certainty, until it is settled by further adjudication. But at present we regard it as a question between a technical view of the subject and a substantial view of it, and we are inclined to believe that the courts will construe such a grant with such a promise, as in fact a grant of an exclusive right, and will apply to it the same rule of law, permitting them to take this right away on making compensation. (*t*)

The Louisa R. R. Co. 13 How. 71, 90, *Curtis*, J., contended for the power of the legislature to make such a contract, but the court declined to pass upon the question. See Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35, 69.

(*t*) The Enfield Toll Bridge Co. *v.* The Hartford & N. H. R. R. Co. 17 Conn. 40, 454. In the plaintiff's charter, granted in 1798, for the building of a bridge over Connecticut River, between Enfield and Suffield, it was provided, that no person or persons should have liberty to build another bridge over that river, between the north line of Enfield and the south line of Windsor, during the continuance of the charter. The legislature, in 1835, granted a charter to the defendants to construct a

It must be remembered that the right of eminent domain authorizes the taking of private property by the sovereign, first, for public purposes; and second, on making or providing for compensation. But one of these conditions is as essential as the other; and it is only when both are regarded, that private property can lawfully be taken. It follows, therefore, that if there be no public necessity, there is no public right; and that land taken by the sovereign, without such necessity, although for compensation, is unlawfully taken. (*u*)

Let us now recur to the question we first asked, whether a grant with a covenant that the property or franchise granted

railroad from Hartford to the north line of the State and thence to Springfield, Mass., and to build a bridge across the Connecticut for the purposes of a railroad track exclusively; and it was also provided in the charter, that nothing therein contained should be construed to prejudice or impair the rights then vested in the plaintiffs. The railroad was laid out in the most direct and feasible route, and the company proceeded to construct a bridge for railroad purposes only, within the exclusive limits of the Enfield Toll Bridge. It was held, that a railroad, though belonging to a "private corporation," is a "public use;" and the franchise of a toll-bridge "private property," within the meaning of the constitution; that the franchise of a toll-bridge may be taken for the purposes of a railroad, by granting compensation; that the covenant in this case was a part of the contract creating the corporation, and was a part of the franchise itself, and subject to the same laws; that the reservation in the defendant's charter, that nothing therein should be construed to impair the plaintiff's rights, did not protect them from the exercise of the power of eminent domain, but only secured them equal rights; the right to demand compensation, if their franchise should be impaired by the construction of the road. The case of the Boston & Lowell Railroad Co. *v.* The Salem & Lowell, the Boston & Maine, and the Lowell and Lawrence Railroad Companies, 2 Gray, 1, turned upon a question quite similar to that considered in the text. In 1830 the plaintiffs were incorporated, to make a railroad from Boston to Lowell. The twelfth section of their charter enacted, "That no other railroad shall, within thirty years, be authorized to be made from Boston, Cambridge, or Charlestown, to Lowell, or to any place within five miles from the northern termination of the Boston and Lowell Railroad." Afterwards, the three defendant companies were successively incorporated; and by their junction and intersection, there was a direct railroad route from Lowell to Boston. And this action was a suit in equity, praying for an injunction against the defendants. The court did not decide that the acts incorporating the three defendant railroad companies were unconstitutional, for this obvious reason, that substantial use might be made of all these railroads without interfering with the plaintiff's; and no use of them, in terms, infringed upon the charter of the plaintiffs. But the court held, that the charter of the Lowell Railroad was, in all its provisions, constitutional, and legal, and that the three defendant railroads, by their conjunction, interfered with the rights secured by the charter of the Lowell Railroad, and on that ground granted the injunction prayed for.

(*u*) That if the public interest does not require it, private property cannot be taken for public uses, although compensation be provided, see Beekman *v.* The Saratoga & Schenectady R. R. Co. 3 Paige, 45; West River Bridge Co. *v.* Dix, 6 How. 543, 544, 546. Per *Woodbury*, J.: "The franchise of an existing highway cannot be taken for a new highway of the same character, laid out upon the old one; for that would be essentially transferring A's property to B." Boston Water Power Co. *v.* Boston & Worcester Railroad Corporation, 23 Pick. 393.

should be for ever free from taxation, can be supported. Again, we admit, that no certain answer can now be given to this question. But, as before, we say that if this covenant prevents all future taxation, in fact it must be void; because every legislature has the right to determine what property shall be taxed, without regard to what may have been done by a preceding legislature, and without the power of binding a subsequent legislature. But this covenant or promise may be supported, and no such consequence follow; for the property thus exempted may be taxed, and compensation made. It might be said that it involves an absurdity to suppose a legislature, laying a tax of an hundred dollars, and voting the same sum to be paid to the taxed party; and it must be precisely that sum, or it would not be compensation. And the effect would be only to put the State to the trouble and expense, first of collecting the tax, and then of paying the money. But, while it may be true, that if money be paid in compensation, it must be the same sum that is taken, it is not true that the compensation must necessarily be made in money. It is at least supposable, that there may be other modes of compensation equally just, satisfactory, and expedient. And then the whole case might be brought, by construction, within the principle of something given, which may be resumed upon compensation. The argument, that if the legislature are permitted to have this power, they might carry it to an excess which would seriously impair the resources of the public, applies as well to many of their important and unquestionable powers, of which the abuse is easy and might be very injurious. Moreover, if the exercise of this power, and in this way, was carried to an extreme, the grant or contract might perhaps be annulled, as a constructive fraud. (*v*) For in such a case, it might be inferred, not only that the agent of the public is opposed to the will and injures the interests of his principal, but that this misconduct must have been obvious to the party benefited by it; and the general principles of agency and of contracts would avoid such a transaction. (*w*)

(*v*) Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 63, 64.

(*w*) In the State of New Jersey *v.* Wilson, 7 Cranch, 164, it was *held,* that an

It is now well settled, and on obvious grounds, that the abandonment of the taxing power is not to be presumed, where

act of the legislature of New Jersey, giving effect to an agreement between the tribe of the Delaware Indians and the commissioners of New Jersey, for an exchange of lands, and declaring that the lands to be purchased for the Indians "shall not hereafter be subject to any tax," by virtue of which the proposed exchange was subsequently effected, constituted a contract — and a law, repealing the section exempting the lands purchased from taxation, was held unconstitutional — although the Indians had, after the exchange, obtained a legislative act authorizing a sale of the lands, and when taxed they were owned by their vendees. *Marshall*, C. J.: "Every requisite to the formation of a contract is found in the proceedings between the colony of New Jersey and the Indians. The subject was a purchase, on the part of the government, of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon; which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract, clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it. Of this case it has been observed that there was no restriction on the colonial government — that the right of the legislature to surrender or limit the taxing power so as to bind its successor, was not raised — and that it may be sustained on the ground that it was in the nature of a *treaty* with the Indians." Brewster *v.* Hough, 10 N. H. 143; Debolt *v.* The Ohio Life Insurance & Trust Co. 1 Ohio State, 589. In Gordon *v.* Appeal Tax Court, 3 How. 133, the State of Maryland had passed acts pledging the faith of the State not to impose any further tax on certain banks, upon their accepting and complying with certain conditions, as subscribing for the construction of a road, which were duly accepted and complied with. It was held, that the individual stockholders were thereby exempted from taxation for shares in the stock of the banks, and a law imposing such a tax was unconstitutional, as impairing the obligation of a contract. The construction of the statute exempting the banks, was the only question raised by the defendant's counsel, who maintained that it exempted merely the corporate franchise, and not the property of the banks, or the shares of the individual stockholders in the stock. This question of construction is the only one to which the opinion of the court is directed. In Providence Bank *v.* Billings, 4 Pet. 561, *Marshall*, C. J., speaking of the taxing power, said: "We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist." In Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 394, the court forbore to express an opinion on the question. The case of New Jersey *v.* Wilson, has been followed in Connecticut. Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 id. 335; Parker *v.* Redfield, 10 id. 495; Landon *v.* Litchfield, 11 id. 251; Armington *v.* Barnet, 15 Vt. 751; Herrick *v.* Randolph, 13 Vt. 525. On the other hand the Superior Court of New Hampshire has strongly intimated an opinion, that the taxing power is an essential attribute of sovereignty, inherent in the people under a republican government, and that the legislature cannot exempt land from taxation, so as to bind future legislation, without an express authority for that purpose in the constitution, or in some other way directly from the people themselves. Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 69; Brewster *v.* Hough, 10 id. 138; Backus *v.* Lebanon, 11 id. 24. The Supreme Court of Ohio, in elaborate opinions, has recently held that the taxing power is a sovereign right of the State, essential to its existence, delegated by the people to the General Assembly, to be used as a means to secure the ends of government, and that among the powers delegated to that body, there is none to surrender or limit this right so as to abridge the control of future legislation over it; that it has power to exercise

the deliberate purpose of the State to relinquish it does not distinctly appear. (*x*) And, on the other hand, if the constitution of a State exempts property from taxation, the legislature cannot authorize its assessment. (*y*)

SECTION IV.

OF THE RELATION OF THIS CLAUSE TO MARRIAGE AND DIVORCE.

The effect of this clause upon the subject of marriage, or rather of divorce, has also been considered, but not yet fully ascertained and defined by adjudication. It has been contended that marriage is not a contract which comes within the scope of this clause; but it may be considered that it has been settled, that this clause *may* operate on the contract of

it for the purposes for which it was granted, but no power over the right itself. Debolt *v.* Ohio Life Insurance & Trust Co. 1 Ohio St. 563; Mechanics and Traders Bank *v.* Debolt, id. 591; Knoup *v.* The Piqua Bank, id. 603; Toledo Bank *v.* Bond, id. 622; Milan & R. Plank Road Co. *v.* Husted, 3 Ohio St. 578. But see Piqua Bank *v.* Knoup, 16 How. 369, in which the judgment of the State court in the first three cases was reversed.

(*x*) A bank charter does not carry with it by implication an exemption from taxation. Providence Bank *v.* Billings, 4 Pet. 514, 561. *Marshall*, C. J.: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it, — that a consideration sufficiently valuable to induce a partial release of it may not exist, but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." The Philadelphia & Wilmington R. R. Co. *v.* Maryland, 10 How. 376. *Taney*, C. J.: "This court, on several occasions, has held, that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." Portland Bank *v.* Apthorp, 12 Mass. 252; Bank of Watertown *v.* Assessors of Watertown, 25 Wend. 686, 1 Hill, 616, 2 id. 353; Brewster *v.* Hough, 10 N. H. 138; Gordon *v.* Baltimore, 5 Gill, 231; Herrick *v.* Randolph, 13 Vt. 525. Accordingly, it has been held, that where a charter prescribes the payment of a certain per cent. on the dividends of the corporation, as a tax, that is a temporary rule of taxation, which may afterwards be increased. Easton Bank *v.* Commonwealth, 10 Barr, 442; Debolt *v.* Ohio Life Insurance and Trust Co. 1 Ohio St. 563, 16 How. 416. The legislature may exempt property from taxation for the time being, and a town cannot levy a tax upon it until the law exempting it is repealed. Brewster *v.* Hough, 10 N. H. 142; Capen *v.* Glover, 4 Mass. 305. But a town cannot, by a grant or stipulation in a conveyance, exempt property thereafter from taxation Mack *v.* Jones, 1 Foster, 393.

(*y*) Hardy *v.* Waltham, 7 Pick. 108; Brewster *v.* Hough, 10 N. H. 144; Fall *v.* County of Sutter, 21 Cal. 237.

marriage, leaving only the question as to what is the effect and operation of the clause. It might seem, on general principles, that, if it be applicable at all, it must go so far as to prevent any divorce for reasons which were not sufficient ground for divorce when the marriage was contracted. Or, in other words, that a legislature might pass what law it would as to divorce, limiting its effect to marriages which should take place after the law was enacted; but that any law creating new grounds or new facilities for the divorce of parties married before the law was passed, would impair the obligation of the marriage contract, and therefore be void. We have not, however, sufficient adjudication for positively asserting this as law. (z) And in one very important case, — in which, however, it is true that whatever touches marriage is spoken altogether *obiter*, — it is implied, that any divorce is valid which is granted for any cause which may be regarded as a breach of the marriage contract; for if this contract be broken, there is no obligation left to be impaired. (a) If this be so, the operation of this

(z) It was held in Clark *v.* Clark, 10 N. H. 380, that a general law providing for the dissolution of existing marriages, for transactions occurring *subsequent* to its passage, which were not grounds of divorce when the marriage was contracted, is not within the prohibition of this clause of the constitution.

(a) Dartmouth College *v.* Woodward, 4 Wheat. 518. *Marshall*, C. J.: "The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." *Story*, J., pp. 695–697: "As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is a matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts recognized as valid, in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractus*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws, by private persons, are certainly contracts of civil institution. Yet no one ever supposed that, when acquired *bona fide*, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court. . . . A *general* law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing *the obligation of such a contract.* Holmes *v.* Lansing, 3 Johns. Cas. 73. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract. Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to *general* laws regulating divorces, upon breaches of that contract. But if the argument means to assert, that the legislative power to dissolve such a contract, without *any breach on either side against*

clause upon the contract of marriage would be confined to preventing a divorce at the will of one party, against the will of the other party, and for no cause. It should be added, that there is, at least, one judicial decision; that marriage is not only a contract, but much more than a contract, and so much more that it is not to be considered as within the scope or intention of the clause of the constitution. (*b*)

the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not intrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibitions, as any other contract for a valuable consideration. A man has quite as good a right to his wife as to *the property* acquired under a marriage contract. He has a legal right to her society and her fortune; and to divert such right without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estates. I leave this case, however, to be settled when it shall arise. I have gone into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument derived from this source does not impress my mind with any new and insurmountable difficulty. The *dicta* of *Story*, J., are ratified in Ponder *v.* Graham, 4 Fla. 23. In Holmes *v.* Holmes, 4 Barb. 295, it was held, that, as respects property, the contract of marriage must stand upon the same footing as other contracts, and that where the husband, by virtue of the marriage relation or as incident thereto, becomes entitled to the property of the wife, a law passed subsequent to their marriage, and vesting her property solely in herself, as her own sole and separate property, is void, as impairing the obligation of a contract.

(*b*) Maguire *v.* Maguire, 7 Dana, 183, 184. Per *Robertson*, C. J.: "Marriage, though in one sense a contract, because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds, is nevertheless, *sui generis*, and unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And, therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like *mere contracts*, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will, either with or without the consent of *both* parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered or subjected to political restraint or foreign control, consistently with the public welfare. And, therefore, marriage being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties. So far as a dissolution of a marriage, by public authority, may be for the public good, it may be the exercise of a legislative function; but so far as it may be for the benefit of one of the parties, in consequence of a breach of a contract by the other, it is undoubtedly judicial." In White *v.* White, 5 Barb. 474, *Mason*, J., held, that marriage is not a contract, in the common law or popular sense of the term, and that the relation of husband and wife is not within the prohibition of the constitution respecting contracts, and came to a conclusion adverse to that intimated by *Story*, J., in Dartmouth College *v.* Woodward. In Londonderry *v.* Chester, 2 N. H. 268, per *Woodbury*, J., marriage was held to be a mere civil contract.

SECTION V.

OF THE RELATION OF THIS CLAUSE TO BANKRUPTCY AND INSOLVENCY.

This subject has already been considered, to some extent, in the preceding chapter. We add, that the language of this clause is exceedingly general. It comprehends all contracts; and whatever may have been in the minds of the framers of the constitution (*c*) — and arguments have been strongly urged on this ground, to limit the operation of this clause — it is now quite settled that the clause is to be construed by itself, so far, at least, that there is no contract which a State law can affect, which is not within the prohibition. Hence a contract between two States is a contract in this sense and for this purpose. (*d*)

(*c*) Dartmouth College *v.* Woodward, 4 Wheat. 518, 644, per *Marshall*, C. J.: "It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say, that had this particular been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

(*d*) Green *v.* Biddle, 8 Wheat. 1; Hawkins *v.* Barney, 5 Pet. 457. A contract of a State with an individual, whether it assumes the form of a grant or not, is a contract within the prohibition of the constitution. New Jersey *v.* Wilson, 7 Cranch, 164; Fletcher *v.* Peck, 6 id. 87. *Marshall*, C. J.: "When, then, a law is in its nature a contract; when absolute rights have vested under the contract; a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." Winter *v.* Jones, 10 Ga. 190; Adams *v.* Hackett, 7 Foster, 294; Providence Bank *v.* Billings, 4 Pet. 560. In Woodruff *v.* Trapnall, 10 How. 190, the State of Arkansas chartered a bank of which it owned all the stock, and provided in the charter that the bills of the bank should be received in payment of debts due the State; it was held, that a contract subsisted between the State and the holders of the notes, and that a repeal of that provision could not affect notes in circulation at the time of the repeal, with which the holder might discharge any debt due from him to the State.

This clause leaves no room for any question as to the degree in which the obligation of a contract is impaired, in order to come within the prohibition. Any change which bears injuriously upon the *obligation*, is fatal, and avoids the law which makes this change.

The constitution gives to Congress the power of making a bankrupt law. But it seems to be settled that this power is not *exclusive;* because the several States may also make distinct bankrupt laws, each State for itself. (*e*) In fact, however, no State has enacted a bankruptcy law under that name; but all, or nearly all, have insolvent laws, or at least laws making provision of some sort of cases of insolvency; and some of these insolvent laws seem to contain all the elements and characteristics which should entitle them to the name of bankrupt laws. (*f*) But, on the one hand, our several States are distinct and independent sovereignties, and in some respects foreign to each other. Yet, on the other, the intercourse between the citizens of the several States, and the intimacy of their social and business relations, is as close and constant as between fellow-citizens of the same government or the same city. From this circumstance there arises one very great difficulty in regard to the operation of these insolvent laws; and this is much increased when it is complicated with those which spring from the application of this prohibitory clause of the constitution. And such has been the singular character of the adjudication upon this subject; the same courts presenting, in different cases, very different views of the same question; few of them of leading importance being decided with unanimity; and in some instances, different judges being led to identical conclusions by reasons which seem to be antagonistic; that we

(*e*) Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 id. 213; Blanchard *v.* Russell, 13 Mass. 1. *Contra*, Golden *v.* Prince, 3 Wash. C. C. 313.

(*f*) There seems to be no distinction between a bankrupt and an insolvent law, so far as the interpretation of this provision of the constitution is concerned. Sturges *v.* Crowninshield, 4 Wheat. 122. *Marshall*, C. J.: "The difficulty of discriminating with any accuracy between insolvent and bankrupt laws, should lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." Both of these subjects have been considered in the preceding chapter.

are hardly prepared to say that any one of these questions is as yet finally and positively settled.

Thus, the distinction is taken between the obligation and the remedy, both in the courts of the United States, and in those of the States. But, as we have remarked in the preceding chapter, in which this topic has been somewhat considered, we can hardly say what it means. If applied only to imprisonment of the person, there is at least no difficulty in understanding it; and then we begin with saying that a State may pass a valid act lessening or abolishing imprisonment for a debt contracted before the act; (*g*) and from this we may go on to sustain an insolvent law, which provides that there shall be no arrest of the person (for, if no imprisonment, it would be absurd to arrest), for any debt of one who comes under the protection of the law. This would suggest, as the next question, whether every thing of process as well as imprisonment, comes under the head of remedy, and not of obligation. It is not easy to draw, on principle, a distinct and unquestionable line here. Imprisonment is the last and most effectual remedy; but it is only the last of many successive steps, which are linked together in unbroken series. The first step may be arrest of the person, or attachment of the goods, or only the summons or a command to pay the debt, like the old original writ. Whatever it may be, it is not easy to see why it is not of the same nature, and under the same category, as the last step to which it leads. In other words, is not all resort to law used for the purpose of obtaining the remedies of the law; and are not civil processes parts of these remedies, differing only as they belong to different stages of the process, and to different degrees in the recusancy of the debtor? If so, every State has perfect power over all its processes; and, therefore, it may provide, as to any debt, that no process shall ever after issue, by which any thing of compulsion shall be exerted upon the debtor, and it shall be left entirely to his own discretion and pleasure as to

(*g*) Sturges *v.* Crowninshield, 4 Wheat. 122; Mason *v.* Haile, 12 id. 370; Beers *v.* Horton, 9 Pet. 359; Gray *v.* Munroe, 1 McLean, 528; Starr *v.* Robinson, 1 D. Chip. 257; Fisher *v.* Lacky, 6 Blackf. 373; Woodfin *v.* Hooper, 4 Humph. 13; Bronson *v.* Newberry, 2 Doug. 38.

the payment of the debt; and this law is protected by this view of the constitution of the United States, because it does not impair the obligation of that debt. It is at least equally difficult to deny, that the courts have made, and perhaps established, this distinction between the remedy and the obligation, or to avoid these conclusions, as logical if not legal. But a distinction is taken here, and on so much authority, that it may be regarded as established. It is, that while exemption from arrest, or from imprisonment, affects only remedy, an exemption of the property from attachment, or a subjection of it to a stay-law, or appraisement law, impairs the obligation of the contract. And such a statute can be enforced only as to contracts made subsequently to the law. (*h*) At the same time,

(*h*) There has of late been a tendency, in the courts of the United States, to render the distinction between the *obligation* and the *remedy* to a great extent inoperative, by regarding the remedy to be so connected with the obligation, as in many respects to be a part of it, and holding unconstitutional such legislation on remedies existing at the time the contract was made, as, by a change of the remedy, takes away or materially impairs the creditor's rights. Bronson *v.* Kinzie, 1 How. 311. See Green *v.* Biddle, 8 Wheat. 1, 75. Thus, a law of the State of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it would bring two-thirds of its valuation according to the appraisement of three householders, was held, as regards contracts made prior to its passage, unconstitutional. McCracken *v.* Hayward, 2 How. 608, 612. Per *Baldwin*, J.: "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract, more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." And again, 613, 614: "The obligation of the contract between the parties in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant, till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws, giving these rights, were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant has made such an agreement as to authorize a sale of his property which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale, on reasonable notice, it

however, it is admitted that a State may make partial exemptions of property, as of furniture, food, apparel, or even a homestead. (*i*)

It is to be observed, that, as to the *remedy*, there can be no difference between a debt existing before, and one contracted after the law is made. There may be a difference as to the propriety or expediency of the law, but none as to the right of the State to pass the law; for this right is perfect, except so far as it is controlled by this clause in the constitution. And on this ground it has been held, that nothing in the constitution of the United States prevented a State from passing a valid law to divest rights which had been vested by law in an individual, because this was not a contract. (*j*) And it has been decided in Connecticut, that a State law making valid a void contract, does not impair the obligation of a contract within the intent of the constitution of the United States. (*k*)

We have, therefore, to inquire which of these insolvent laws

would have conferred a right on the plaintiff, which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a State legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds; for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy, which are regardless of the effect on the right of the plaintiff. These cases have been the subject of much comment in the State courts." See cases cited in the next note.

(*i*) It has lately been held in New York (overruling Quackenbush *v.* Danks, 1 Denio, 128, 3 id. 594, 1 Comst. 129), that a law exempting property of the debtor from execution, which was liable to execution when the debt was contracted, merely modifies the remedy for enforcing contracts, and does not destroy or substantially modify its efficiency, and is therefore constitutional. Morse *v.* Gould, 1 Kern. 281. So it is held in Michigan, that property may be exempted from execution for debts contracted before the law of exemption was enacted. Rockwell *v.* Hubbell, 2 Doug. 197. See Bronson *v.* Newberry, 2 id. 38; Evans *v.* Montgomery, 4 Watts & S. 218; Bumgardner *v.* The Circuit Court, 4 Mo. 50; Tarpley *v.* Hamer, 9 Smedes & M. 310.

(*j*) Calder *v.* Bull, 3 Dall. 386; Satterlee *v.* Mathewson, 2 Pet. 412; Watson *v.* Mercer, 8 id. 89; Charles River Bridge *v.* Warren Bridge, 11 Pet. 540, 549; Baltimore and Susquehannah R. R. Co. *v.* Nesbit, 10 How. 395; White *v.* White, 5 Barb. 474; Baugher *v.* Nelson, 9 Gill, 299. So in Wilson *v.* Hardesty, 1 Md. Ch. 66, it was *held*, that a law which limited the defence to a usurious contract to the excessive interest, was valid, although at the time the contract was made there was a law declaring such a contract absolutely void.

(*k*) Welch *v.* Wordsworth, 30 Conn. 149.

affect only the remedy, and which go further and discharge the debt. It may be found that most are in the nature, or use the language, of a *cessio bonorum*, leaving the debt still existing; some, however, discharge it altogether. And perhaps it may be gathered from the adjudications, up to this time, that an insolvent law of a State, which discharges the debt, is valid only as it refers to contracts made after the law was passed; and that if an insolvent law makes no distinction in this respect, it would be construed as intended only to apply to subsequent debts, and therefore as valid; but if it purports expressly to discharge existing and antecedent debts, it is for this reason void, and of no effect whatever. (*l*) And if it does not discharge the debt, but only exempts the person from imprisonment, if he surrenders all his property for all his debts, this is valid, because it affects only the remedy; and it would seem to be valid equally whether it applies to all existing debts or only to subsequent debts. (*m*) On the other hand, if it not only exempts the person from imprisonment, but also the property from attachment on mesne process and on execution, this would be held void as against the constitution, because it impaired the obligation of the contract. But as we have already intimated, we say this on authority, without undertaking either to maintain or to define this distinction, on reason or on principle, any further than to remark, that a doctrine which would go far to reconcile the cases, and which may have a practical value, though not much logical precision, would be this: legislation on the remedies of prior contracts would be constitutional, provided its modification of these remedies still leaves substantial and efficient means of enforcing them. (*n*)

From our statements on this subject in the preceding chapter, and the authorities there cited, it will be inferred, that a State insolvent law operates in favor of its citizens who are insolvent

(*l*) Sturges *v.* Crowninshield, 4 Wheat. 122; M'Millan *v.* M'Neill, 4 id. 209; Ogden *v.* Saunders, 12 id. 213; Boyle *v.* Zacharie, 6 Pet. 348; Planters Bank *v.* Sharp, 6 How. 328; Mather *v.* Bush, 16 Johns. 233; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Blanchard *v.* Russell, 13 Mass. 1; Kimberly *v.* Ely, 6 Pick. 440; Norton *v.* Cook, 9 Conn. 314; Smith *v.* Parsons, 1 Ohio, 107.

(*m*) See cases cited *ante*, note (*g*).

(*n*) Sturges *v.* Crowninshield, 4 Wheat. 122; James *v.* Stull, 9 Barb. 482; Bruce *v.* Schuyler, 4 Gilman, 221, 227; Stocking *v.* Hunt, 3 Denio, 274; Howard *v.* Kentucky & Louisville M. Ins. Co. 13 B. Mon. 285.

— whether as to remedy or as to obligation — only as to other citizens of the same State; (*o*) and not against citizens of other States, who have not assented to the relief or discharge of the debtor, expressly or by some equivalent act, as becoming a party to the process against him under the law, taking a dividend, and the like. (*p*) Such has been the ruling of the courts of the United States. But in Massachusetts it has been held, that a certificate of discharge under the insolvent laws of that State, is a bar to an action on a contract made with a citizen of another State, although the latter has not proved his claim under these laws, if the contract was by its express terms to be performed in that State. (*q*) This distinction has, however, been repudiated in New York, Maryland, Connecticut, and Maine, and in the United States Circuit Court for the first Circuit. (*r*)

SECTION VI.

OF THE MEANING OF THE WORD "OBLIGATION" IN THIS CLAUSE.

A question, not the same with those we have considered, yet closely akin to them, has been much discussed. It is, what

(*o*) M'Millan *v.* M'Neill, 4 Wheat. 209; Ogden *v.* Saunders, 12 id. 213; Cook *v.* Moffat, 5 How. 295; Van Reimsdyk *v.* Kane, 1 Gallis. 371; Hinkley *v.* Marean, 3 Mason, 88; Baker *v.* Wheaton, 5 Mass. 509; Watson *v.* Bourne, 10 id. 337; Bradford *v.* Farrand, 13 id. 18; Walsh *v.* Farrand, id. 19; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297; Norton *v.* Cook, 9 Conn. 314. But a discharge by the bankrupt law of a State within which the contract was made, and of which the debtor was a citizen when it was made, is a good bar to an action brought in another State. Blanchard *v.* Russell, 13 Mass. 1. So also, where the discharge was granted in a State where the contract was made between the citizens of that State, and the action was brought in another State. Pugh *v.* Bussell, 2 Blackf. 366. See May *v.* Breed, 7 Cush. 15; where it was *held*, that a discharge under the English bankrupt law, of a merchant residing in England, from a debt to a citizen of Massachusetts, contracted and payable in England, is a bar to a subsequent action on the debt in that State, whether the debtor proved his debt under the English commission of bankruptcy or not.

(*p*) Clay *v.* Smith, 3 Pet. 411. But see as to assent, Kimberly *v.* Ely, 6 Pick. 440; Agnew *v.* Platt, 15 id. 417.

(*q*) Scribner *v.* Fisher, 2 Gray, 43, *Metcalf*, J., dissenting. This case was affirmed in Burrall *v.* Rice, 5 Gray, 539; Capron *v.* Johnson, id. note. This exception to the general rule, however, only applies when the contract is expressly made payable in the State under the laws of which the defendant claims a discharge. Dinsmore *v.* Bradley, 5 Gray, 487; Houghton *v.* Maynard, 5 Gray, 552.

(*r*) Donnelly *v.* Corbett, 3 Seld. 500; Poe *v.* Duck, 5 Md. 1; Anderson *v.* Wheeler, 25 Conn. 613; Felch *v.* Bugbee, 9 Amer. Law. Reg. 104; Demeritt *v.* Exchange Bank, U. S. C. C., Mass., 1857, 20 Law Reporter, 606; Hale *v.* Baldwin, U. S. C. C., Mass., 1861, 24 Law Rep. 270.

does the term "obligation" in this clause, include? The importance of the question rests mainly on the distinction which has been drawn between the laws of a State which were in force at the time the contract was made, and those which are subsequently enacted. The latter may certainly impair this "obligation," while the former, as it is contended, certainly cannot, because all existing laws enter into contracts made under them, and define and determine that contract. Upon this principle, the insolvent laws of a State, which on certain terms discharged all remedies on contracts made after its passage, between the citizens of the State, have been held to be constitutional. Those who hold to the distinction maintain, that the "obligation" of the contract consists in the municipal law existing at the time the contract is made, (*s*) or perhaps in a combination of the moral, natural, and municipal law, (*t*)

(*s*) "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." Sturges *v.* Crowninshield, 4 Wheat. 122. *Marshall*, C. J.: "What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice. in the case of Sturges *v.* Crowninshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge. It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced." Ogden *v.* Saunders, 12 Wheat. 257, 259, per *Washington*, J., *Thompson*, J., p. 302, citing the extract from Sturges *v.* Crowninshield, said: "That is, as I understand it, *the law of the contract forms its obligation*; and if so, the contract is fulfilled and its obligation discharged, by complying with whatever the existing law required in relation to such contract; and it would seem to me to follow, that if the law, looking to the contingency of the debtor's becoming unable to pay the whole debt, should provide for his discharge on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency." And per *Trimble*, J., p. 318: "From these authorities, and many more might be cited, it may be fairly concluded, that the obligation of the contract consists in the *power and efficacy* of the law which applies to and enforces performance of the contracts, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term obligation." In Johnson *v.* Higgins, 3 Met. (Ky.), 566, it is laid down as the settled law of Kentucky, that, "the legal obligation of a contract consists in the remedy given by law to enforce its performance, or to make compensation for the failure to perform it." Also, that laws prescribing the terms and jurisdiction of courts, relate not to the remedy for enforcing the contract, but to the tribunals by which the remedy is to be administered. Courts, in a legal sense, comprise no part of the remedy.

(*t*) "Right and obligation are considered by all ethical writers as correlative terms. Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to bestow. The obligation of every contract will then consist of that right or power over my

while those who deny the distinction, insist that the "obligation" consists in the universal law of contracts, which is unaffected by municipal law, and is not itself conferred or created by positive law, but derived from the agreement of the parties. (*u*)

The question has also been raised, whether this clause of the constitution limits or affects the power of the State to enact general police regulations for the preservation of the public health and morals. Thus, if a legislature grant a charter to a corporation to hold land for the purpose of burying the dead within the limits of a city; can a subsequent legislature, for the purpose of preserving the health of the city, prohibit all persons from burying the dead within the limits of the city, and by this prohibition render their former grant useless and inoperative? Or can a legislature, having authorized an individual or a company to raise a certain sum of money by lotteries, or after having licensed individuals to sell spirituous liquors for a certain period, afterwards, for the purpose of preserving the public morals, recall such authority or license, by a general law, prohibiting lotteries, or the sale of spirituous liquors? And if this can be where the grant or license was gratuitous, can it also be done if a certain price or premium was paid for it? While the authorities are not uniform, we consider the prevailing adjudication of this country to favor the rule, that such general laws are not, in either case, within the purview or prohibition of the constitution. (*v*) If nothing is paid for the license or the authority, the authorities are quite uniform that it may be taken away by such general law. But where a fee or

will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured, neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three, — an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law." 12 Wheat. 281, per *Johnson*, J.

(*u*) "Contracts have consequently an intrinsic obligation. . . . No State shall 'pass any law impairing the obligation of contracts.' These words seem to us to import that the obligation is intrinsic; that it is created by the contract itself, not that it is dependent on the laws made to enforce it." Ogden *v.* Saunders, 12 Wheat. 350, 353, per *Marshall*, C. J.

(*v*) Phalen's case, 1 Rob. (Va.), 713; Phalen *v.* Virginia, 8 How. 263; Hirn *v.* The State of Ohio, 1 Ohio State, 15; Baker *v.* Boston, 12 Pick. 194; Vanderbilt *v.* Adams, 7 Cowen, 349; Coates *v.* The Mayor, &c., of New York, id. 585; see 24 Am. Jurist, 279, 280.

premium has been paid, there are cases which hold this to constitute a contract that is binding on both parties. (*w*)

It is certain that a State may pass an act limiting the time within which existing rights of action shall be barred. But a reasonable time must be given after its passage, within which these rights may be enforced. (*x*)

Cases have also arisen under the clause of the constitution of the United States, which relates to the regulation of commerce by Congress. In these cases the supreme court appear to recognize the validity of police regulations or statutes which indirectly affect the exercise of powers, which, by the constitution, belong exclusively to congress. (*y*) We do not refer to these questions, however, particularly, as they do not seem to come within the scope of the Law of Contracts.

(*w*) State of Missouri *v.* Hawthorn, 9 Mo. 389. See Freleigh *v.* The State, 8 id. 606; State *v.* Sterling, id. 697; State *v.* Phalen, 3 Harring. (Del.), 441.

(*x*) Sturges *v.* Crowninshield, 4 Wheat. 122, 207. *Marshall*, C. J.: "If, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality." Jackson *v.* Lamphire, 3 Pet. 290; Bronson *v.* Kinzie, 1 How. 311; McCracken *v.* Hayward, 2 id. 608; Society, &c. *v.* Wheeler, 2 Gallis. 141; Call *v.* Hagger, 8 Mass. 423; Blackford *v.* Peltier, 1 Blackf. 36; Proprietors of Ken. Purchase *v.* Laboree, 2 Greenl. 293; Beal *v.* Nason, 14 Me. 344; Griffin *v.* McKenzie, 7 Ga. 163; West Feliciana R. R. Co. *v.* Stockett, 13 Smedes & M. 395; Butler *v.* Palmer, 1 Hill, 328; Pearce *v.* Patton, 7 B. Mon. 162; James *v.* Stull, 9 Barb. 482; see *Story*, Com. Const. § 1379.

(*y*) Smith *v.* Turner, 7 How. 283, as to the State taxes on passengers. Thurlow *v.* Massachusetts, 5 How. 504, as to the laws of Massachusetts, of Rhode Island, and of New Hampshire, prohibiting the sale of spirituous liquors. New York *v.* Miln, 11 Pet. 102, as to statute of New York prescribing sundry regulations as to passengers brought to that State. Cooley *v.* The Board of Wardens of the Port of Philadelphia, 12 How. 299, as to State Pilotage laws.

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